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## APPENDIX

### RELEVANT DOCKET ENTRIES

*1969*

Oct. 9—Complaint of National Organization for Women filed with Pittsburgh Commission on Human Relations.

Nov. 3—Commission finds probable cause (1 dissenting vote) and directs public hearing be held.

Nov. 7—Respondent Pittsburgh Press Company furnished with copy of Complaint.

Nov. 20—Respondent requests postponement of hearing.

Nov. 21—Hearing postponed to January 15, 1970.

*1970*

Jan. 6—Answer to Complaint filed.

Jan. 15 and 16, Feb. 12 and 26—Hearings held before Pittsburgh Commission on Human Relations.

July 23—Order of Pittsburgh Commission on Human Relations filed.

Aug. 21—Appeal of Pittsburgh Press Company from Order of Pittsburgh Commission on Human Relations filed at No. S. A. 768 1970 in Court of Common Pleas of Allegheny County, Pennsylvania.

Aug. 21—Petition for Supersedeas of Pittsburgh Press Company granted and bond in the amount of $1500.00 filed.

Sept. 9—Answer to petition for appeal and counterclaim filed.

Nov. 9—Praecipe for Appearance of the Commission filed.

*Relevant Docket Entries.*

Nov. 9—On Order of Court, leave is granted American Civil Liberties Union, Greater Pittsburgh Chapter together with Civil Rights and University Committee for Women's Rights to file a brief Amici Curiae.

Nov. 10—Record received and filed.

Nov. 10—Brief for City of Pittsburgh filed.

Nov. 10—Petition to intervene of National Organization for Women filed.

Nov. 11—Brief on behalf of the National Organization for Women filed.

Nov. 17—On Order of Court National Organization for Women is permitted to intervene as a party appellee.

Nov. 20—Brief of Amici Curiae filed.

Nov. 23—Supplemental Brief Amicus Curiae of the Equal Employment Opportunity Commission filed.

Nov. 30—Reply briefs of Pittsburgh Press Company and amicus curiae the American Newspaper Publishers Association filed.

*1971*

Mar. 24—Opinion of Martin, J. filed affirming order of the Human Relations Commission and the Pittsburgh Press Company directed to comply with the order dated July 23, 1970, within 30 days.

April 21—After argument of counsel, the order dated the 23rd day of March amended to direct compliance with the order of July 23, 1970, on or before May 10, 1971.

April 22—Appeal of Pittsburgh Press Company filed with Commonwealth Court of Pennsylvania.

*Relevant Docket Entries.*

April 28—Certiorari from the Commonwealth Court of Pennsylvania filed showing an appeal ex parte by Pittsburgh Press at No. 315 C. D., 1971, returnable 20 days after service.

April 30—Petition for supersedeas presented and granted by Kramer, J. following hearing.

June 25—Record lodged with Commonwealth Court of Pennsylvania.

*1972*

January 27—Opinions and Dissenting Opinions of the Commonwealth Court of Pennsylvania filed.

February 18—Petition of the Pittsburgh Press for allowance of appeal filed with the Pennsylvania Supreme Court.

June 21—Petition for allowance of appeal denied by the Pennsylvania Supreme Court.

## COMPLAINT OF NATIONAL ORGANIZATION FOR WOMEN, INC.

### Complaint

CHR—Form 1 (55) Number: FHP
COMMISSION ON HUMAN RELATIONS FEP 558
PITTSBURGH, PENNSYLVANIA CRC
on the complaint of National Organization for Women Complainant against Pittsburgh Press Respondent

Date: October 9, 1969

I National Organization for Women residing at 726 St. James Street (32) Telephone 621-4753 charge Pittsburgh Press whose address is 34 Boulevard of the Allies (22) Telephone 263-1100 with a discriminatory practice relating to employment on or about September 10, 1969 & before by (See particulars below.) because of RACE ( ) RELIGION ( ) ANCESTRY ( ) NATIONAL ORIGIN ( ) COLOR ( ) PLACE OF BIRTH ( ) SEX (X) The particulars are:

The National Organization for Women charges the Pittsburgh Press with deliberate and constant violations of Section 8(j) of the Human Relations Ordinance as amended by Ordinance 395. The National Organization for Women has attempted on several occasions to convince editors and publishers of the Pittsburgh Press that their policy of allowing employers to place advertisements in the male or female columns, when the jobs advertised obviously do not have bona fide occupational qualifications or exceptions, is unlawful.

I have not commenced any action or proceeding based upon the above grievance.

(Juror omitted in printing)

*Notice of Public Hearing.*

## NOTICE OF PUBLIC HEARING

## PITTSBURGH COMMISSION ON HUMAN RELATIONS

NATIONAL ORGANIZATION FOR WOMEN
v.
PITTSBURGH PRESS
} FEP 558

## NOTICE OF PUBLIC HEARING

TO: Mr. Barney G. Cameron
Vice President
Pittsburgh Press
34 Boulevard of the Allies
Pittsburgh, Pennsylvania 15230

Mr. Gerald H. F. Gardner
National Organization for Women
726 St. James Street
Pittsburgh, Pennsylvania 15232

You are hereby notified that pursuant to Sections 13(g), (h) and (i) of Ordinance No. 75 of 1967 of the City of Pittsburgh, as amended by Ordinance No. 395 of 1969, a public hearing will be held by this Commission on December 10, 1969, at 10:00 a.m., Eastern Standard Time, in Bar Association Meeting Room, 9th floor, City-County Building, Grant Street, Pittsburgh, Pennsylvania, to consider the above-captioned complaint.

Annexed hereto is a statement of the charges contained in said complaint.

DAVID B. WASHINGTON
Executive Director

Dated 11/10/69

*Notice of Public Hearing.*

## STATEMENT OF CHARGES CONTAINED IN THE COMPLAINT OF THE NATIONAL ORGANIZATION FOR WOMEN AGAINST THE PITTSBURGH PRESS

The National Organization for Women charges the Pittsburgh Press with deliberate and constant violations of Section 8(j) of the Human Relations Ordinance as amended by Ordinance 395.

The National Organization for Women has attempted on several occasions to convince editors and publishers of the Pittsburgh Press that their policy of allowing employers to place advertisements in the male or female columns, when the jobs advertised obviously do not have bona fide occupational qualifications or exceptions, is unlawful.

## ANSWER TO COMPLAINT

## BEFORE THE COMMISSION ON HUMAN RELATIONS PITTSBURGH, PENNSYLVANIA

NATIONAL ORGANIZATION FOR WOMEN
v.
PITTSBURGH PRESS
} FEB. 558

### Answer to Complaint Before the Human Relations Commission

1. A complaint was filed before the Commission on Human Relations of the City of Pittsburgh on October 9, 1969. An informal meeting was held between certain members of the Commission, the complainants and representatives of the Respondent Pittsburgh Press on October 16, 1969. At that time an informal position letter from the Pittsburgh Press on the general problem of Male-Female help wanted advertising was presented. Subsequent thereto the Commission, at its meeting November 3, 1969, directed that a public hearing be held. Said hearing is schedule for January 15, 1970. Pursuant to Rule 7(f) of the Regulations of the Commission on Human Relations, the Respondent Pittsburgh Press hereby submits this Answer.

#### PRELIMINARY OBJECTIONS

Respondent contends that the complaint should be peremptorily dismissed for the following reasons:

1. The complaint is so vague that Respondent is not adequately able to defend it on its merits. It does not meet the requirements of Rule 2(c) of the regulations of the Human Relations Commission.

2. The complaint does not comply with Rule 2(a) of the Commission's regulations in that neither the complainant Mr. Gardner nor the National Organization for Women is aggrieved within the meaning of the Rule.

3. The complaint alleges a violation of Section 8 J of the Human Relations Ordinance. Section 8 J makes it unlawful employment practice,

> ". . . to aid, incite, compel, coerce or participate in the doing of any act declared to be an unlawful employment practice or to obstruct or prevent any person from enforcing or complying with the provisions of this ordinance or any rule, regulation or order of the Commission or to attempt directly or indirectly to commit any act declared by this ordinance to be an unlawful employment practice."

The complaint does not allege any violation by any other person. The Respondent cannot be guilty of aiding etc. another in the violation of the ordinance when no such violation is proved or even alleged. One cannot aid that which did not occur. Neither does the complaint state or allege that the Respondent as an employer is itself violating any provision of the ordinance. Respondent contends that without alleging or proving a violation of the ordinance by an employer which was aided etc. by Respondent the complaint is invalid on its face and must be dismissed.

4. The chief allegations of the complaint seem to be a failure to accede to the requests of the complainant or NOW. This does not constitute a

violation of laws and therefore the complaint does not state a cause of action upon which relief can be granted.

5. The Human Relations Ordinance contains numerous exemptions and exceptions. The complaint does not indicate whether the acts complained of were without those exemptions and if so—how.

6. The complaint is an effort to regulate the method of presenting want ads to suit reader preference. Such regulation would constitute an abridgement of freedom of the press in violation of the First Amendment to the Constitution of the United States of America.

7. Nothing in the ordinance prohibits directly or through implication the classification of help wanted advertising and reader interest groupings and the complaint is therefore void on its face.

ANSWER TO THE APPARENT INTENT OF THE COMPLAINT

1. The Respondent denies that any part of its help wanted advertising classification system violates any section of the Pittsburgh Human Relations Ordinance. On the contrary, Respondent has gone to great efforts to establish a system which complies with both the letter and the spirit of all applicable Civil Rights Laws.

Respondent's defense of this system is outlined as follows:

1. The Human Relations Ordinance prohibits discrimination in employment on account of sex. It does

not mandate the elimination of all distinctions between men and women.

2. There are fundamental differences between men and women and in their social and cultural mores. These differences manifest themselves in job preferences.

3. There is no law prohibiting men and women from preferring different types of work.

4. Such job preferences have been recognized in separating help wanted advertisements into male, female, or male and female.

5. In considering illegal job criteria other than sex, such as race, religion, etc., such job preferences do not exist in any significant degree. Negroes and whites have essentially similar job preferences as do those with differing ethnic and religious backgrounds. It is not valid to compare discriminatory racial preferences with legitimate job interest classifications between men and women.

6. To be certain that classifications of jobs by sex cannot be assumed to be purposes of discrimination, the Pittsburgh Press has adopted the headings "Jobs-Male Interest" and "Jobs-Female Interest" and has put a clear, boldly printed explanatory box on every page of want ads. By its very wording this convenient method of listing jobs is not discriminatory. There is no law or ordinance prohibiting the recognizing of job preferences of the sexes any more than there is the recognizing of reader preferences in establishing a society section or a "News of Interest to Women" section. The Council of the City of Pittsburgh did not prohibit the

isting of want ads by reader preferance. It is not with-
n the capacity of the Human Relations Commission to
stretch the language of the current ordinance to cover
hat which it was never meant to cover. The ordinance
says that employers may not discriminate in hiring on
he basis of sex. It does not say that Newspapers can-
not recognize by classified want ads that men and wo-
men generally tend to favor different jobs. One of the
safeguards of the democratic process is that the van-
guards of social change are the province of legislation
not that of quasi-judicial agencies established to en-
force, not make the laws. NOW apparently wishes to
radically restructure the preferences of men and wo-
men. The Respondent is not legally compelled to help
hem do so.

The complaint should be dismissed.

CHARLES R. VOLK
THORP, REED & ARMSTRONG
Attorneys for Respondent
Pittsburgh Press Company

*Hearing of January 15, 1970.*

# TRANSCRIPT OF TESTIMONY OF HEARINGS BEFORE THE PITTSBURGH COMMISSION ON HUMAN RELATIONS

## Hearing of January 15, 1970

BEFORE THE COMMISSION ON HUMAN RELATIONS
PITTSBURGH, PENNSYLVANIA

National Organization for Women
v.
Pittsburgh Press

Proceedings of hearing held before the Commission on Human Relations. T. Z. KORSAK, Chairman; REV. WILLIAM E. JOHNSON and MRS. L. J. REIZENSTEIN, Commissioners; City Council Chambers, City-County Building, Grant Street, Pittsburgh, Pennsylvania, Thursday, January 15, 1970.

APPEARANCES
*Representing*:

National Organization for Women
Attorney STANLEY VALADEZ

The Pittsburgh Press
Attorney CHARLES R. VOLK

Pittsburgh Commission on Human Relations
City Solicitor RALPH LYNCH

*Amicus Curiae*
*Representing*:

Allegheny County Council on Civil Rights
Attorney GILBERT VENABLE

American Newspapers Publishers Association
Attorney RALPH N. ALBRIGHT

*Hearing of January 15, 1970.*

National Association of Women Lawyers
Attorney JANE PICKER

Pennsylvania Human Relations Commission
Attorney S. ASHER WINIKOFF

Women's Equity Action League
Attorney JANE PICKER

Eve Guggenheim
Attorney EVE B. GUGGENHEIM

American Newspapers Publishers Association
Attorney W. FRANK STICKLE

Opening statement on behalf of the Commission on Human Relations in FEP Case no. 558 — National Organization for Women v. THE PITTSBURGH PRESS.

Will you please come to order.

This hearing has been ordered by the Commission on Human Relations to consider the charges of unlawful employment practices filed by the National Organization for Women against Respondent. The hearing will be conducted by a hearing panel, composed of three members, appointed by the Commission on Human Relations in conformity with the requirements of Ordinance No. 395, approved July 7, 1969. The members of the panel are Mrs. Florence S. Reizenstein, Reverend William E. Johnson, and your speaker, T. Z. Korsak.

The Commission on Human Relations was established by Ordinance No. 237, approved June 25, 1955, as amended. That ordinance as amended prohibits discrimination in employment because of race, color, religion, ancestry, national origin, place of birth, or sex, and gave

the Commission administrative and enforcement powers in the field of employment.

On October 9, 1969, the National Organization for Women filed a formal complaint with the Commission charging PITTSBURGH PRESS with violation of Section 8 (J) of the Human Relations Ordinance. The primary aim of the Commission on Human Relations is to eliminate discriminatory practices by conciliation and persuasion through private steps. A number of complaints have been satisfied in this manner. Notwithstanding attempts for conciliation, including a private hearing on October 17, 1969, a complete conciliation of this complaint was not secured.

On November 3, 1969, the Commission with one dissenting vote found that probable cause existed in the complaint and directed a public hearing to be held.

On November 7, 1969, both parties were notified that the public hearing would be held in the case and the Respondent was furnished with a copy of the complaint.

On November 10, 1969, a notice of the hearing and a statement of charges was sent to the Complainant and Respondent and the hearing was scheduled for December 10, 1969. On November 20, 1969, the Respondent requested the postponement of the hearing and on November 21, 1969, the Commission postponed the holding of the hearing until January 15, 1970.

On January 6, 1970, Respondent PITTSBURGH PRESS filed its answer to the complaint with the Commission, which answer contained preliminary objections. The answer of the Respondent and its preliminary objections

will be made part of the record of this hearing and will be considered by the Commission in its reaching its decision. The following organizations have asked to enter an appearance as amicus curiae: American Newspaper Publishers Association for PITTSBURGH PRESS

The Allegheny County Conference on Civil Rights, the National Association of Women Lawyers, The Pennsylvania Human Relations Commission and the Women's Equity Action League on behalf of the National Organization for Women.

Since it is the purpose of the Commission to get all the facts pertaining to the issue in this case, the participation of the amicus curiae has been authorized by the Commission and after the presentation of the case by the Complainant and by the Respondent, the amicus curiae will have the opportunity to present their views either orally, by submitting briefs, or both. Pursuant to the provisions of the Human Relations Ordinance, the Commission adopted procedures for public hearings, which procedures are part of its regulations filed in the Department of Law on January 6, 1969 as amended on December 1, 1969, said amendment being filed in the Department of Law on December 4, 1969. Parenthetically, the amended rule is Rule 5 which deals with reconsideration by the Commission. A copy of the Regulations was distributed to all interested parties.

Rule 7 of the said Regulations of Chapter 1 thereof, controls the procedure for public hearings. Subparagraph (1) of paragraph (i) on the Rule provides that the circumstances surrounding the complaint shall be presented before the Hearing Commissioners by the City Solicitor. Since this is not a Commission initiated com-

plaint, although the City Solicitor will be present at the hearing, to advise the Hearing Commissioners on the point of law, the City Solicitor shall turn over the presentation of the case on the part of the Complainant to the Complainant's Counsel. Both parties before this hearing may be represented by counsel, submit testimony and other evidence and cross-examine all witnesses.

In the conduct of this hearing, the Hearing Panel shall not be bound by the strict, technical, rules of legal evidence. The Hearing Panel has the full authority to control the conduct and procedures governing this hearing and to admit or exclude testimony or other evidence presented. The Hearing Panel will rule on all motions and objections. All rulings and determinations made by the Hearing Panel will be by a simple majority vote. The Hearing Panel may call and examine witnesses, may request the production of documents or other matters present in the hearing room. It may direct the City Solicitor and his Assistants to introduce documentary or other evidence. All stipulations that may be entered into during the course of this hearing may be made on the record at the open hearing. A stenographic record will be made of this hearing. Within a reasonable time after the conclusion of this hearing, the Hearing Panel will issue its findings of facts, and such order as the finding of fact shall warrant.

The Commission decisions will be based on the facts developed during the hearing and put into the record. The Commission will approach this matter with an open mind. The Hearing Panel may find that the facts developed do not substantiate the charges filed, or on the other hand, it may find that the facts do substantiate

the charges. The fact that the Commission called the public hearing will not prejudge the outcome of this matter.

If the parties are represented by Counsel, the Chair would like at this time to have the Counsel indicate their appearance for the record.

National Organization for Women
Attorney Stanley Valadez

The Pittsburgh Press
Attorney Charles R. Volk

Pittsburgh Commission on Human Relations
City Solicitor Ralph Lynch

*The Chair*: All right, now, this would end the picture taking and I would call now on the City Solicitor to start the proceedings.

*Mr. Volk*: Mr. Chairman, as noted in your opening statement, the complainant is represented by Counsel and has entered their appearance.

*Mr. Valadez*: And the Respondent is represented by Counsel whose appearance has been entered, together with amicus curiae. So I think you can begin to proceed with the case.

*The Chair*: In this case, I will call on the complainant.

*Mr. Volk*: Before you do so, we would like to interpose our preliminary objections and they are intended to go to the initial phases of a proceeding. We feel that while the Commission is not bound by the technical rules of evidence, its being a quasi-judicial body issuing orders supposedly by law bound by the concept of due process

of law as embodied in the Fourteenth Amendment of the Federal Constitution and also the Pennsylvania Constitution, and that in regard to that we feel that any preliminary matter of going to the holding of this hearing or to the complaint under which it is held, particularly the sufficiency of the complaint or as to any other technical matter not going to the actual thrust of the complaint should be fully heard prior to the taking of any testimony and prior, well, to the taking of any testimony and prior to any discussion of the alleged merits of the complaint. We have filed with due notice seven preliminary objections contending that they go to the very fundamental freedoms of the Press and to fundamental matters which are of interest to newspapers throughout the country. This being almost a case of complete first impression in the United States of America: There are very few other instances where newspapers have been askd to do the radical act that the complainants here seek. We therefore feel that due process of law compels the Commission to hear full argument on the preliminary objections and to take briefs on them and to rule on them before any testimony is taken. This position was stated to the City Solicitor's office, although not to the current City Solicitor, and to the Attorney for the Petitioners. A preliminary meeting was conducted last week or the week before. So it does not come as any surprise to them that this is the approach we are going to take.

At this time, I would like to leave with the Commission, for myself and amicus curiae, the various preliminary matters we have filed.

Incidentally, one technical aspect. I assume it is permissible for Counsel to remain seated.

*The Chair*: So long as you are audible please feel free to be comfortable. We do not require people to stand up except where witnesses are sworn in.

Now, it is quite true that due process and constitutions govern our proceedings. It is also, however, quite true that these are not proceedings of a nature which you would bring in Common Pleas Court or in County Court. And, consequently, unless you object to the jurisdiction of the Commission, then your preliminary objections were not as to jurisdiction but as to lack of due process. We will hear your arguments as part of your response. And for simplicity's sake, since we are not bound by technical rules, I will deny your motion to present your views at this time but at the time that your turn comes, then you can present all the arguments you want to, plus briefs, plus any testimony, so that the Commission can fully get the picture on which to make its decision.

Now naturally our decision, as you know, is appealable. You always have the right to appeal from our order and that way your due process will be protected. We are more after the fact and the truth. We don't want to deny anybody due process, but in conformity with our standard procedure we noted your preliminary objections. If you want to make additional arguments, you may do so at your turn.

*Mr. Volk*: Well, that's your ruling. I assume we are permitted to make a comment upon it. Therefore you are asking us to come before you and defend a complaint so vague and so improperly drawn as to be incapable of adequate defense. You are also calling us to come forward and defend before you the charge of aid-

ing and abetting a crime which had not been alleged that anybody committed. You are, therefore, putting us at our peril to defend something that is ineffective in its beginning. This, sir, is denial of due process and I think some of the civil libertarians who comprise some part of your Commission and who perhaps are here today would indicate very strongly that denial of process is not cured by right of appeal. Therefore many criminals are walking the street who were denied due process in initial proceedings and this was not cured by right of appeal. Certainly, if you do deny us due process, which you just have, we can appeal it and have the whole proceedings overturned and an Order of Court having it ruled to be held over again. And if that is what the Commission wants, that is what we will do. I want Mr. Stickle to comment, too. He has the right.

*Mr. Stickle*: I would like the record to reflect the position of the amicus for the American Newspaper Publishers Association; we do believe, agree, and indicate in our petition to appear, that we observe procedural defects in the proceeding. And I would like the record to show we believe the procedural defects and preliminary, depositive of this particular proceeding on the complaint brought by the National Organization for Women.

*The Chair*: We will call a recess for two minutes. (A two minute recess was had)

*The Chair*: Before I continue, since the amicus curiae responded before I would ask that those who represent themselves for the record at this time.

The amicus curiae for the Complainant then identified themselves:

*Hearing of January 15, 1970.*

*Representing*:

American Civil Liberties Union,
Greater Pittsburgh Chapter
Gilbert Venable, Esq.

Allegheny County Council on Civil Rights
Gilbert Venable, Esq.

Women's Equity Action League
Jane Picker

National Ass'n of Woman Lawyers
Jane Picker

Eve B. Guggenheim
Eve B. Guggenheim, Esq.

Pennsylvania Human Relations Commission
S. Asher Winikoff

*The Chair*: Mr. Volk, after consulting with the City Solicitor, we have decided to let you represent argument on the matter of due process. But please be, if possible, brief.

*Mr. Volk*: I assure you, sir, that while I can't guarantee that I will be brief, we will certainly not be redundant, nor will we argue at any length greater than we feel absolutely necessary to properly present the point.

Our first objection to the complaint, or whatever it is — declamation, I would call it, rather than complaint — filed by the National Organization for Women is too vague to be capable of adequate defense. We contend that it violates in itself on wording Section 2C of the regulations of your Commission, Which 2C5 says the dates or date of the alleged unlawful discriminatory practice — I am sorry — the alleged unlawful practice

and a statement of all particulars thereof and the dates or date of alleged discriminatory practices-thereof itself; by any judicial standard, the declamation filed by the National Organization for Women does not allege the particulars thereof and does not allege how the discriminatory practice which is charged is indeed discriminatory, except that it apparently violates the wishes and desires of the organization NOW, the National Organization for Women. Now we feel the failure to accede to the desires of this organization may be socially reprehensible in the opinion of this organization and perhaps some of their supporters. But it is not illegal and does not constitute a violation of the Human Relations Ordinance, at least, not yet. Secondly, and I might add, sir, this is not a pettifogging defense. We have been presented with the list of eight witnesses who are expected to testify. None of them apparently private individuals who have been discriminated against. I don't know until we hear the testimony. We don't have the slightest indication of the direction the Complainant will take, whether it will be the usual mishmash of pseudopsychology and sociology. We have heard them—or whether it's actually going to address itself to some proofs that might stand up in court. We, up to now, don't know what to defend. We have been charged with the declamation of discrimination without knowing this particular practice is discriminatory.

*The Chair*: May I interject at this point? If after the presentation of the Complainant's case you will need time for specific answers, the Hearing Panel will be quite willing to grant you sufficient time to prepare specific answers, because, after all, what we're after is finding of facts, whether or not the Ordinance was

violated. And I don't want to be argumentative and it may be true that complaints at times are not artistically drawn, but this is not, as I say, Common Pleas practice proceeding.

*Mr. Volk*: I don't want to be argumentive when I'm supposed to be making a speech. But the fact this is not a Common Pleas Court does not relieve the Commission of following the basic tenets of due process of law and to use instead of the word "of art" a practice word, a basic, good, legal proceeding. Because while your orders are not themselves enforceable by you, they are enforceable by Common Pleas Court. And an order which will be enforced by a court must be drawn in a manner which would be sufficient for that court to determine if the order is proper. So we are, in effect, before Common Pleas Court. We are informal, I will admit to that. But we are not a French Revolutionary pre- guillotine or before the guillotine revolutionary body. Not yet. Businesses have few civil rights perhaps, but they have a couple left. And one of them I think, is the right to due process of law.

*The Chair*: Now, let me say this, Mr. Counsel. That when we agreed to permit you to make a statement on due process we did not expect a political or sociological statement representing a viewpoint.

*Mr. Volk*: I don't believe, sir, that you have gotten one. That last statement of mine was in response to an interjection of yours. It was not a preliminary objection.

*The Chair*: I am not a French Revolutionary. I am a Conservative.

*Mr. Volk*: It was addressed to a procedure.

*Hearing of January 15, 1970.*

*The Chair*: The Commission procedure may be very — not yet perfect. But we are after the facts. So will you proceed, please?

*Mr. Volk*: Our second complaint is a more technical one, and one I will not dwell on. And that is that the complaint does not comply with the regulation 2A in that neither the complainant, Mr. Gardner, who does not allege in his affidavit that he is complainant for N.O.W., although we will waive that objection, nor is it the National Organization for Women who is aggrieved within the meaning of the rule. We don't see how any of these are aggrieved. Mr. Gardner doesn't say he was discriminated against nor does the National Organization for Women say who was discriminated against. This however, I think is a very important argument. And that is our next one. The complaint alleges a violation of Section 8J of the Human Relations Ordinance. Section 8J makes it an unlawful employment practice to aid, incite, compel, coerce or participate (it could be any of those) in the doing of an act declared to be an unlawful employment act, or to obstruct or prevent any person from enforcing or complying with the provisions of this ordinance, it rules, regulations, etc. The complainant does not allege which of those words of art the Press is guilty of committing. However, we assume the thrust of the complaint is that by publishing want ads under a male or female column we are aiding the commission of a violation by some employer, who himself is prohibited from discriminating in his hiring policies. We, therefore, appear to be — the complaint is defective in one or two ways. It does not tell us what we are supposed to be guilty of doing. It does not say the Pittsburgh Press it-

self has been discriminating in its hiring and it does not say who we have aided and abetted.

Now, the Human Relations Ordinance is of limited scope. It applies to the City of Pittsburgh. Obviously it does not apply to the state of Pennsylvania or to the United States. And it has within it certain exceptions. It only applies to employers of five or more. It does apply to employers from outside the city of Pittsburgh. It does not apply if there is a bona fide occupational qualification. Theoretically, the Pittsburgh Press would be perfectly able to help an employer of four or more discriminate, if they wanted to, which they don't. They would be perfectly able to help the McDonald Aircraft Corporation, from wherever they may be, outside the state of Pennsylvania, and city of Pittsburgh, to discriminate in the hiring of people to work in the state of Washington or California, as far as the ordinance is concerned. Therefore, we feel it incumbent upon the complainant to tell us what we are doing that is bad. We are accused of aiding and abetting someone who has not been accused of anything to be aided or abetted in, and we feel that to be a fatal defect in the complaint. We feel the complaint should have encompassed how we do no fall within the exceptions or exemptions. And it does not state that. And, more importantly, and I would like Mr. Stickle to have an opportunity to present arguments on this, too, this Ordinance, as they want it interpreted before this proceeding, would have required prior censorship on the newspaper in telling them how they are to publish material before it is published. You are telling the newspaper, in effect, that the Pittsburgh Press here can't have an ad or a section of their newspaper to list jobs according to preference, reader interest as they

deem it to be — male interest or female interest. They attempt to tell us, even though there is an explanatory box at the beginning of each section of the want ads, a large explanatory box, stating that the law prohibits discrimination by sex, and that the jobs are only classified this way because of reader interest. They are attempting to tell us we cannot do this; that we can't run our newspaper this way. It is approximately like saying we can't have a section which says "news of interest to women," which is run. We couldn't have a section which would say "news of interest to men," which, we don't have. You are attempting to put prior restraints on the publishing of a newspaper. And we believe, sir, in all sincerity this is in violation of the First Amendment of the Constitution of the United States. And, third, a reading of the ordinance itself by anyone, trained or untrained in the law, will tell you, tell anyone that it does not say anything about help wanted advertising. It talks about discrimination in employment. There is no allegation that the Pittsburgh Press has discriminated in employment. And we feel the complaint as stated is void upon this base.

I would like to have Mr. Stickle to present his views, and I assure you I hope, like myself, he won't be overlong.

*Mr. Stickle*: Mr. Chairman, I would like to make the members of the Commission a very brief statement. Mr. Chairman, you mentioned earlier that perhaps if the matter were jurisdictional you would be interested in hearing of it. It is our position that, indeed, the defects in this complaint are jurisdictional. Indeed, you have jurisdiction of the parties, of the Press and N.O.W.

However, as to the subject matter, unless — and we will talk about it in terms of a crime — unless the court or quasi-judicial body has the jurisdiction to handle the crime, it does not have jurisdiction over the subject matter. I state — and I think perhaps your solicitor would agree — that the mere stating of a violation of 8J is not a statement of the violation of the ordinance. There can be no violation of the ordinance by merely violating 8J. There must be some unlawful conduct. Now 8J provides for aiding, abetting, inciting, compelling, coercing the doing of an act declared to be unlawful in the ordinance. There are any number of acts declared to be unlawful in the ordinance. There is not a question that the complaint has stated all of the actions. It has not stated that any of the unlawful actions have been committed. Therefore, the mere recitation of 8J is a nullity. There has been no complaint or unlawful act stated over which the Commission has jurisdiction. I would respectfully submit on behalf of the amicus that there is no jurisdiction in this Commission to hold a hearing to bring to summons before the Pittsburgh Press on the allegations in this complaint. I would say to force the Press to come here initially, to incur the expense of participating in a hearing of this nature without jurisdiction in the Comission, without the bare allegation of a violation does indeed involve a denial of due process. I heartily endorse those arguments made by Mr. Volk. The reading of the very short complaint indicates a violation only of 8J and then cites a disagreement apparently between the National Organization for Women and the Press. Mr. Volk has stated no defense can be made for that charge. No one can make a defense of a charge of violating 8J. It would be impossible. When a quasi-judicial body such as

this adopts procedural regulations, I believe it is ele
mentary law that his body must follow each and ever
regulation so promulgated. Its failure to follow any par
ticular step in its hearing procedure absolutely canno
avoid court condemnation. That is basic in the law, as
see it. And, indeed, there are several of the regulation
governing the conduct of the hearings specified in regu
lations that simply have not been complied with an
cannot be remedied by the taking of testimony. It is
procedural defect that will remain irrespective of testi
mony or proof.

Mr. Volk said we do have a number of other argu
ments, and I am not going into them now. They are mor
to the substance of attempts to apply this law to th
Press, and not in the Press's capacity as an employer bu
in the Press's capacity as a newspaper publisher. We se
severe Constitutional problems with this proceeding i
we can glean the thrust of N.O.W.'s complaint and hov
they would ask the Commission to apply 8J. We see fur
ther due process problems; we see First Amendmen
problems. You have stated we will make those argu
ments, if and when a case is put on. But we do also hav
a brief we have prepared, to be filed at the earliest mo
ment the Commission will accept it. It relates to the pro
cedural defects and to our substantive arguments relat
ing to any attempt to regulate the Press and bring th
Press in by this type of proceeding, in effect, as one o
the entities covered by the Act. We have 3,000 employ
ers and employment agencies. And the only thing we ca
speculate on is that N.O.W. would like the Commissio
to extend its jurisdiction over newspaper as a category
We think this is defective.

I will not go on because you have stated you want this to be brief. We emphasize that these procedural arguments we have made have great merit, and we do ask that this complaint be dismissed on the basis of these arguments; and if and when a complaint over which this Commission has jurisdiction could be brought, it could be held, wherein the limits of the proceedings will be defined. This is an unlimited, limitless proceeding that can go in all directions under any particular violation of the Ordinance. Thus we urge upon the Commission to dismiss this complaint, of course, without prejudice to N.O.W. If they have complaints that are recognizable under the ordinance, bring them

Thank you.

*Mr. Volk*: I would move that this Commission decides this preliminary matter prior to the taking of testimony. It is part of due process.

*The Chair*: I think, if I may respond to the motion which was already denied, the Commission considered your response and preliminary objections and decided to make them a part of the record. As to the jurisdiction aspects, in my beginning remarks I was very careful to point out that our procedure as set out by the ordinance was observed and that the Commission found probable cause, not unanimously, with one dissenting vote. Since our attempts at conciliation were not completely successful, we had only the one way open, and that is to get a public hearing so that we could get to the merits of the case, including the matter of on the one way discrimination and on the other way censorship.

So at this point I believe I will ask attorney for the complainant to start proceeding his case.

*Hearing of January 15, 1970.*

*Mr. Valadez*: Before calling witnesses, Mr. Chairman, I would like to reply in part to counsel for the respondent.

In your opening statement you indicated that the previous meetings had been had with the Pittsburgh Press; that there had been an interchange of letters and at lease one meeting. So the respondent is fully aware of the problems and issues in this matter. And I would move that we incorporate all the letters or minutes of any meetings that we may have had; that this be incorporated as part of the complaint. And I would further ask that Gilbert Venable, who is here as amicus curiae, be permitted to comment on my motion.

*Mr. Venable*: The thrust of this problem under the due process laws under the 14th amendment is of course, that a person is entitled to know what he is being charged with. Therefore, many functions to pleadings both notice and more formalistic functions to them. However, we feel that this notice function has been met by the prior exchange of correspondence between the National Organization of Women and the Press and the Commission, and that if there is any defect in this fundamental fairness principle it can be cured, it can easily be cured by incorporating these prior documents.

*Mr. Volk*: I would like to say—

*The Chair*: Excuse me. I will let you speak in just a second. Oh, go ahead.

*Mr. Volk*: I want to say, of course, the formal correspondence from the Commission could be incorporated into the Commission on record of the case. However, the meetings at which we were invited to attend were both described as both "informal." We were not summoned.

We were invited and the efforts were made to conciliate. But at no time were we given any form of specific complaint on what acts, what advertisements, who we aided and abetted or any other defect we address ourselves to. And since they were informal meetings to which we were invited, I would request that no minutes of such meetings be incorporated into the record.

*The Chair*: Let me answer the motion and your argument. Since the purpose of the Commission is to achieve conciliation, our conciliation meetings are private and off-the-record. If you want to introduce into evidence any specific letter, you will have to introduce it individually as an exhibit. We cannot have introduced into evidence by wholesale or by reference any document. And our own files on the matter, although they give background to the Commission, are not the matter which would be used to determine the facts in this case. This is why we have this hearing. So if you want to specifically introduce documents, identify them, make them part of the record, we will rule on the documents if there is an objection. But we will not agree to admit wholesale a bunch of documents by reference.

*Mr. Valadez*: We are prepared to proceed and call our first witness. Dr. Gerald H. F. Gardner.

*Hearing of January 15, 1970.*

DR. GERALD H. F. GARDNER, witness called on behalf of the complainant, and first being duly sworn testified as follows:

DIRECT EXAMINATION OF GERALD H. F. GARDNER

*By Mr. Valadez:*

Q. For the record, would you give us your full name?

A. My name is Gerald H. F. Gardner.

Q. Your address, Mr. Gardner?

A. I live in the City of Pittsburgh, 726 St. James Street.

Q. Did you sign on behalf of N.O.W. and file with the Pittsburgh Human Relations Commission any document?

A. Yes, I filed a complaint with the Commission on behalf of the National Organization for Women.

Q. Can you state succinctly for the Commission the matter about which you complained about in the document that you filed?

A. Yes, our complaint is centered on the system which the Pittsburgh Press uses in classifying help wanted advertising. We believe that this system does not present men and women with equal employment opportunities.

Q. Can you tell me what is this organization called N.O.W.?

A. N.O.W. is an organization of men and women. One of the purposes of the organization is to promote equal employment opportunity for all people, but especially for women.

Q. You stated previously that you objected to the system that the Pittsburgh Press uses in classifying help wanted ads. Can you describe the system?

A. Well, there are three main sections in the classified advertising. Section 3 is labelled "Jobs—Male In-

terest." Section 5 is labelled "Male or Female." And Section 6 is "Jobs—Female Interest." Almost all advertising must go into one of those three sections.

Q. How big are those sections?

A. Well, on an average, I would say the male section has about 1600 column inches. The female section has about 400 column inches and the male-or-female section has about 100 column inches.

Q. How are the advertisements arranged in each section?

A. Generally, advertising by employers is arranged in alphabetical order according to the initial letter. Among these advertisements by employers there are advertisements by employment agencies. They usually list many jobs within one block. That block is then usually placed in the section according to the initial letter of some key word which the agency places at the top of the block of the advertisement.

Q. In what way does this system relate to employment opportunity?

A. Well, I would just like to quote one sentence from the City Ordinance, if I may. This is the policy of the City of Pittsburgh. "It is . . . the policy of the City of Pittsburgh . . . to assure the right and opportunity of all persons to participate in the . . . economic life of the City . . . free from restrictions because of race, etc. and sex."

Q. And you have a comment as to whether these employment opportunities listed in this manner are being offered equally to men and women?

*Mr. Volk*: May I raise the objection? I don't wish to be tedious, although so far I have been. I

don't believe that Mr. Gardner has demonstrated any competence to express such policies of sociology and economics as this line of questioning is leading him into. I realize we are not governed by technical rules of evidence, which would be mere petti foggery. Mr. Gardner has quoted the Ordinance, which I am sure you know pretty well. That does not constitute testimony. He is now going to tell us how he believes this system discriminates, which is not factual testimony and this shall be confined to counsel in their briefs or oral arguments. And I move it be stricken as irrelevant.

*The Chair*: Since it may be technically the witness was not qualified as an expert, but since we are interested in developing all the possible facts, we will deny your motion and make you an exception. Proceed please.

Q. The question was to the effect whether the ads presented in this manner offer equal employment opportunities to both sexes. Would you comment?

A. I believe the jobs when published in accordance with this system are not offered equally to men and women. It is a fact that this law about which we are talking treats the categories of race, color, etc., and sex in precisely the same terminology. It does not draw any difference between sex and race. Therefore, we feel that "Jobs-Male Interest" is perfectly analogous to "Jobs-White Interest".

Q. Dr. Gardner, what is your profession?

A. I am a mathematician.

Q. What educational achievements or degrees have you acquired in your field?

A. Doctor of Mathematics, from Princeton University.

Q. What does your work consist of as a mathematician?

A. The work consists of applying mathematics to solving practical problems.

Q. Does this involve the use of any specialized equipment, or give you any knowledge in any field?

A. Yes. One of the ways now a days one can apply mathematics is by use of computers, and much of my work is with computers and people connected with them.

Q. Are there many people working in the data processing field?

A. Yes, this is practically an exploding industry. Last year is was estimated there were 300,000 programmers and systems analysts; next year it is estimated there will be 500,000.

Q. What jobs are commonly advertised for in the Pittsburgh Press for the data processing people?

A. Well, there are about five or six general categories. There are systems analysts, programmers, computer operators, key punch operators and there are math majors and statisticians. And those are the six main heading under which jobs are regularly advertised.

Q. Are women employed now in the data processing field?

A. Yes, to a considerable extent. I think nationwide something like 20 percent. But this varies from company to company. For example, at Bell Telephone Laboratories of all their programmers 40 percent are women.

Q. In the classified advertisements, do they describe data processing, that is does the Pittsburgh Press

describe data processing as a female interest or a male interest occupation?

A. Well, the data processing jobs are divided between the male section and the female section. Only very seldom do they appear in the male-or-female section. The jobs which do appear in the male section are generally system analysts, programmers, computer operators, mathematicians and statisticians. The category which appears in the female section is key punch operator.

Now if I might just make a point on that. In order to see this, I think one should examine the newspaper and see how, for example, employment agencies use this system. Each employment agency has a spectrum of jobs. They have to, within this system, assign certain jobs as having male interest and certain jobs female interest. Now, in order to see how this system evolved

*Mr. Volk*: I am going to object again. We have a man testifying by law of declaration on what the practices are of employment agencies. I think this is improper testimony.

*Mr. Valadez*: The witness has signed a complaint. We are intending to elicit his reasons for filing the complaint. As for the latter part of Mr. Volk's comment, we have some exhibits to show how we arrived at his comment: that the employment agencies use one system or another.

*Rev. Johnson*: Did we understand you to say you have exhibits?

*Mr. Valadez*: Yes, we are about to go into that point now.

*The Chair*: Alright, your objection will be noted and will be overruled.

Q. Dr. Gardner, you have testified that employment agencies practice ads they place in classified sections, or I believe you said primarily with the exception of key punch operators in the male section. Do you have an exhibit or some chart which you have prepared to reflect what you are saying?

A. Yes. In order to bring out what is unfair to women in the way in which people use this system, we prepared as an exhibit, which is in the book which you have in your hand, a compilation of how the advertising agencies placed their advertisements, I think it was on January 4. If we may have that first chart. This chart demonstrates the salaries that are offered by the employment agencies in the various columns. This chart contains the first —

*The Chair*: Excuse me. Now these three things were handed to us, are you proposing to offer it as an exhibit?

*Mr. Valadez*: Yes, we are proposing to offer it as an exhibit at this time. The exhibit will show how the employment agencies advertise in the male and female sections.

*Mr. Volk*: We object for the purpose of the record. Are these documents of different hues the same document?

*Mr. Valadez*: Yes.

*The Chair*: Well, note the objection.

Q. Dr. Gardner, would you comment on the chart, what the chart purports to show.

*Hearing of January 15, 1970.*

*The Chair*: Is the chart to be offered as an exhibit?

*Mr. Valadez*: The chart is incorporated in the exhibit on page 2 of the cover sheet. It is merely enlarged for this purpose. The chart is not exactly a copy of the exhibit.

*The Chair*: Then the chart is not an exhibit?

*Mr. Valadez*: That's right. It does contain portions and illustrations from the document offered as an exhibit.

Q. Dr. Gardner, will you comment on the chart please?

A. Yes. In the exhibit, this list is in alphabetical order. Here it is in the order it was taken from the newspaper, I believe. Now the jobs in red are in order to point out those in which the differential in salary between jobs of interest to men and jobs of interest to women is largest. Those in green show a moderate difference, although this means one is half the other. And the one in blue is fairly comparable. I'd like to comment I'd like to comment on the one in blue, where there is not really a significant difference in salary. All of the jobs which are listed under "female interest" are duplicates of advertisements which were also placed under "male interest." Now, all of these listing here, several of these —

*Mr. Volk*: I am sorry. Could you repeat that please?

A. Say, fifth from the top, CAREER employment agency, all of their advertisements appearing in the "jobs-female interest" section also were placed in the section "jobs-male interest." In other words, these advertisements appear twice.

*Hearing of January 15, 1970.*

*Mr. Volk*: I don't want to intrude. In what manner does it appear there then? Did you put it in both columns?

A. No, I didn't put it in both columns. CAREER put it in both columns.

*Mr. Volk*: I mean for your computation purposes.

A. The female column of the chart contains jobs taken from that section labelled "jobs-female interest." Now some of these agencies specialize in data processing jobs, but they don't appear generally on this chart because these are agencies which have jobs advertised in both columns. But in the exhibit there are listed all of the agencies, and generally the agencies that specialize in data processing just put the jobs in the male section. Sometimes they put one advertisement in the female section, and that is generally for a key punch operator.

Just as a second exhibit, I would like to introduce a single page to point out the discrepancy they use in this system. In the male column there is listed all of these jobs — data processing managers, systems analysts, programmers, and so on, as well as computer operators and key punch operators. But in the female columns, the only advertisement put in is an advertisement for key punch operator.

I would like to have this as a separate exhibit because in this data processing field there is a very definite difference between the ways jobs are advertised for men and women.

*Hearing of January 15, 1970.*

Q. One final question, Dr. Gardner. In reading the Pittsburgh Press, which contains the disclaimers, under the classification of "male" and "female" interest in the data processing field, is it not a convenience for the reader?

A. We have to bear two things in mind. One thing is convenience for the reader. The other is the danger that the job seeker will lose an opportunity by the fact that they do not scan the male interest section because of the presence of the word "male." In other words, many women will not enter that section, in spite of any disclaimer, because they are women and do not want to be identfied as having male interest. So this, I think, is particularly acute in the data processing field because none of these jobs has any sort of qualification which makes it a "male interest" rather than a "female interest" job.

Q. Thank you, Dr. Gardner.

*The Chair*: I would like to call two minutes recess.

(A two minute recess was then had.)

*The Chair*: Mr. Volk.

*Hearing of January 15, 1970.*

CROSS EXAMINATION OF GERALD H. F. GARDNER

*By Mr. Volk:*

Q. Mr. Gardner, as a mathematician, do you own your own company? Do you work for somebody? How do you operate?

A. No, I work for an industrial company.

Q. What is our position?

A. Senior Scientist.

Q. Senior Scientist. As such, do you hire employees?

A. I have on occasion, yes.

Q. Do you hire employees who are recruited by others, or do you recruit your own?

A The company does the recruiting.

Q. You have mentioned the column inches. You gave us certain statistics. Did you measure those column inches with a rule?

A. Yes, that was in January.

Q. Did you measure them with a rule?

A. Yes, an inch ruler.

Q. Mr. Gardner, have you ever been denied a job on the basis of your sex?

A. I don't think so.

Q. You made the statement that the classification "Jobs-female interest", in your view, is the same as "job-colored interest", or job-Irish interest", or some other ethnic classification. Do you have any study or statistics that you have either made or that you have seen that you could give us as proof that there is not a great legitimate grouping of jobs by sex which is not there as in the case of ethnic interest?

A. I don't think any such thing exists.

*Hearing of January 15, 1970.*

Q. You are not in a position to testify that there isn't really a large body of interest in women for certain types of jobs and in men for other types of jobs?

A. I would agree with you that certain employers prefer to hire women for certain jobs. Yes.

Q. That isn't what I said. I was talking about the interest of the job applicant not the interest of the employer.

A. Well, what's generally true, of course, is not relevant to fair employment practices. It is obvious that the interest of the individual is paramount. Even if it happens that women generally prefer one particular type of job, that doesn't mean you exclude all women from applying for some other type of job, or something like that. In other words, if —

Q. You are not then attempting to tell us that there isn't a large trend for women to prefer one type of job?

A. I wouldn't say prefer. I'd say occupy. Many women are secretaries. But that doesn't mean that they prefer secretarial work to something else. Maybe —

Q. We don't know that they don't.

A. No. The fact is, many women are secretaries. Whether they prefer that, is something else. I think —

Q. You have no way of knowing whether this job preference is lesser or greater or anything like that for one ethnic group or another.

A. I don't think it makes any difference. I —

Q. That's an expression of opinion. I'm asking you about facts.

A. Well, the fact is that the law is based on what is true for the individual. If the individual has the capacity to do a job that's what is important. It's not what is generally true in some group. The principle of nondiscrimination is that the individual has to be judged on individual capacities, not on—

Q. Thank you, sir for the learned treatise on the law. I will referr you to Dr. .....

What are the qualifications of a key punch operator?

A. The usual qualification is that they have two or three months' practice. It takes the same amount of time to become an efficient key punch operator as it would be an efficient typist. The jobs are essentially the same.

Q. In other words a key punch operator is essentially a typist on a specialized key board?

A. Yes, but it also helps to be familiar with computer operations. And sometimes they even have to be a programmer.

Q. What are the job requirements for a programmer? What does a programmer have to know?

A. Generally, they have to study several languages at a University suitable for the machine. In other words they have to translate what a person wants done into the instructions which can be transmitted to the machine. There are three recognized levels of programming — Programmers A, B and C. A.: they not only know how to program the machine but they invent the program. Programmer C, at the bottom end, merely translates the instructions of others.

Q. Does a programmer have to know how to type?

A. Yes, usually they do —

Q. Why?

A. Because when you make corrections to a program, you usually do the key punching yourself. The point of having key punchers, as such, is that it is efficient to translate masses of data onto cards, onto programming cards. When you want to make a change in a program you do the key punching yourself.

Q. Does this have to be done rapidly, or as I would do it, with one finger?

A. The thing to do, is to be correct.

Q. It does not require extensive typing skill?

A. Not necessarily. The usual thing is to have key punch operators around because programmers don't have the necessary skill. For a large program you use a key punch operator.

Q. You have given us some statistics on salaries appearing in the male and female interest sections. You didn't break that down into types of jobs.

A. What I did was list the advertisements by each employer and look to see which jobs rated $12,000 and which $6,000.

Q. You made no attempt to break that down on the given day you made the survey, into the number of heavy labor jobs advertised versus the number of executive jobs advertised?

A. Actually, we do have that data but we were not going to present it as an exhibit. But if you like, we do have it.

Q. No. [Laughter] I somehow expected a mass of data. And to prepare a brief will be adequate without incurring any more.

A. That's what we felt, too. [Laughter]

*Hearing of January 15, 1970.*

*Mr. Volk*: Procedurally, sir, is Mr. Stickle or the other amicus curiae permitted to cross exam

*Mr. Volk*: Procedurally, sir, is Mr. Stickle or the other amicus curiae permitted to cross examine?

*City Solicitor*: I understand from Mr. Washington in the preliminary conferences there was some form of agreement that amicus curiae would not.

*Mr. Washington*: This was our understanding with counsel.

*Mr. Volk*: I don't really remember what was discussed. I don't remember agreeing to anything.

*Mr. Valadez*: Amicus curiae would limit himself to making oral or written briefs.

*The Chair*: What I would propose to do is reserve the ruling on this matter until after the lunch recess.

*Mr. Volk*: We dont take a strong position on it your honor, because there are four or five amicus curiae. And if we all cross examination, it would prohibit the proceedings. We only have one on our side. That's what we had. That's why we would like to do it.

*City Solicitor*: I think there would be very little gain.

*The Chair*: If amicus curiae would like to ask a question, he could ask his counsel. Otherwise, I think it would be rather lengthy.

*Mr. Volk*: Could we have a second while we discuss this?

*The Chair*: Surely.

Q. Mr. Gardner, what is it that you, as complaintan want the Pittsburgh Press to do that they are nc doing? What sin do you wish them to omit an what virtue do you what to come in?

A. Well, I could make a suggestion of how you coul solve the whole problem. You merely have no hea ings of any kind. List all the jobs alphabetically.

Q. Alphabetically, by what?

A. By the key letter chosen by the advertiser on th basis of some key word. Like "data processing would go under D. That's what happens now, withi each section.

Q. How would you suggest we handle something lik "salesman"? Would you say "salesman and/c woman"?

A. No. You have already solved that problem, becaus now you advertise in this sphere for "sales person

Q. In the Pittsburgh Press?

A. Yes. [Laughter]

Q. They have done that in quite a few instances?

A. I think they have recognized —

Q. To eliminate discrimination from individual ads. A a matter of fact they have a program — do yc know that they have a program to eliminate an hint of discrimination itself?

Q. I have never heard of the program, but, in fac their advertisements are much better.

Q. Precisely. Data processing people go to trainin schools, don't they, sir?

A. They also go to universities.

Q. I misphrased the question, I believe. There ar schools that train people in data processors?

A. Most data processors don't go to those schools.
Q. There are key punch operators who do?
A. Yes.
Q. Do a large percentage of your key punch operators go to such schools?
A. I think they probably do.
Q. They teach it in some high schools, do they not, sir?
A. I think so.
Q. Do you have any knowledge of a difference in percentage of girls versus boys who enter these key punch operator schools?
A. There are substantially more women who are key punch operators than men. But, there are men.
Q. But there are primarily girls in business school and technical schools who take key punch operating?
A. There are more girls who are key punch operators, but that doesn't mean they prefer key punching to something else.
Q. I am not asking that. I am asking are there more girls in the schools to learn?
A. I don't know that.
Q. How about schools to teach programming.
A. There are departments at the university, like the department of computer science.
Q. I see ads for data processing for technical schools.
A. They are not worth much.
Q. They may not be worth much, but do they train them?
A. They don't train good ones. That's one of the problems in today's society. Programming is an expanding field. It looks attractive to people. They say, go to school and become a programmer. What they learn is not programming. They are taught super-

ficial things. In my opinion, it's a bad sort of thing that is happening.

Q. Do you know the percent of male and female who enroll in these courses?

A. You were talking about training programs? No. In university departments of computer science the ratio is about thirty percent female. Women are discouraged from entering this field although they are not actually prohibited.

Q. Who discourages them?

A. All sorts of people, including the Pittsburgh Press by putting jobs for key punch operators in the "female interest" section. If a woman restricts her reading, which I presume you would like them to do, to female interests, then the only data processing job she would see is key punch operating, which is not attractive.

Q. What you would like to do is for the Pittsburgh Press to take the initiative in guiding the wishes of girls in choosing careers?

A. No, not —

Q. Rather than reflect the interest as it presently exists.

A. No, what we want the Pittsburgh Press to do is advertise jobs for men and women so that there is equal opportunity, equal access to reading them.

Q. I think we are getting argumentative now. In your survey on advertising, on January 4, did you take them all, the whole want ad section?

A. Yes.

Q. Including 'laborer' wanted, 'yardman or yardwoman', 'firepersons'?

A. What is in this exhibit is all the advertising by employment agencies, and the other exhibit we did not introduce included the advertising by all employers. It is more voluminous. This is to show how agencies divide jobs which they advertise between the two sexes.

Q. You did not take the little individual ads?

A. We did in the other, not in this one.

Q. That's all.

*Mr. Valadez*: No further questions.

*City Solicitor*: Mr. Chairman, I would like to ask one question. I'm not too sure if we have it in the record.

*By the City Solicitor*:

Q. As I understand it, that in compiling the exhibit and testifying about it, you are a mathematician and a concerned individual, but you have no particular training or background or education in this area other than a mathematician? Is this what the record shows?

A. You mean formal education in this area? No. But I have been studying this problem for some time now, so I am somewhat familiar with the way employers and employment agencies advertise.

Q. There is no technical education or employment background?

A. No.

*The Chair*: The witness is dismissed.

*Mr. Volk*: I was just going to suggest if your next witness is going to be a lengthy one, it might be wise to break now.

*Mr. Valadez*: Our next witness will not be a lengthy one, unless the cross examination would be.

*The Chair*: We had planned to break at twelve. So if your examination is about twelve minutes. If counsel for respondent does not mind examining after lunch.

*Mr. Volk*: I don't care. It might be an inconvenience to the witness if he has to go somewhere.

*The Chair*: In this case, I will call a recess now and we will reconvene at one twenty.

*Mr. Volk*: Any objections to our leaving our materials at the table?

*The Chair*: I hope they are safe, but I can't guarantee it.

(The public hearing recessed at 11:48 a.m.)

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Tape #3. Afternoon session. January 15, 1970.

NOW vs. The Pittsburgh Press.

*The Chair*: The hearing will please come to order. Before I call on Mr. Valadez for his next witness, I would like to call on the City Solicitor to present on record his assistant, who will continue the hearing.

*City Solicitor*: I would like to have introduced on the record Assistant City Solicitor JOHN L. DAUGHERTY, who will represent the Commission during my absence.

*The Chair*: MR. VALADEZ, are you ready to introduce your next witness?

*Mr. Valadez*: SARAH MORTON.

*Hearing of January 15, 1970.*

SARAH MORTON, called as witness on behalf of NOW, and being first duly sworn, testified as follows:

DIRECT EXAMINATION OF SARAH MORTON

*By the City Solicitor*:

Q. What is your name?
A. My name is Sarah Morton.
Q. And what is your address?
A. 5739 Walnut Street.
Q. Pittsburgh?
A. That's right.
Q. What is your profession?
A. I am a librarian. I have a Master's degree in Library Science.
Q. Have you had occasion to utilize the Pittsburgh Press, specifically, the classified section?
A. Yes, on January 5, I used the January 4 classified ads in search for different jobs.
Q. And what was your experience?
A. Well, I experienced complete prejudice in the "Male Interest" column.
Q. Can you tell us?
A. Let me read it here. I write it out. First column was under "Jobs - Female Interest" and the job was was listed as Librarian. I said I was inquiring about the Librarian job,, and the woman asked if —

*Mr. Volk*: Before she goes on, I am not going to object, but I would like to call the attention of the Commission to the general low regard to which commissions and informal bodies not adhering to strict rules of testimony regard testimony.

*Sarah Morton*: I am a 28 year old white woman with a mid-western accent. On Monday, January 5,

I made four calls in response to want ads in the Pittsburgh Press. I have reconstructed them below to the best of my memory.

Call #1. Answering ad under "Jobs—Female Interest" — "Librarian" (Listing Agency — Manpower, 626 North American Rockwell Building Fifth Avenue and Wood street, 391-7030)

I said I was inquiring about the Librarian job. The woman asked me if I had a degree in Library Science, which was specified in the ad. I said yes. She told me about the job and told me to come down to apply.

Call #2. Answering ad under "Jobs—Female Interest" — "Teachers Part Time" (Listing agency — Employment Specialists, 2248 Oliver building, 261-2250)

I said I was inquiring about the part-time teaching job. I asked her if I could teach part-time without any education credits. She said only in parochial schools. She took my name and address and said she would send me an application.

Call #3. Answering ad under "Jobs — Male Interest" "Trainee Programmer Sys" (Listing agency — Career Personnel Service of Pittsburgh, 4151 Jenkins Arcade, 471-8926)

I said I was inquiring about the trainee programmer systems job. She said, are you a man or a woman? I said I was a woman but that it was illegal to discriminate because of sex. She said, very defensively, that I wouldn't want to work there because it was in a bad neighborhood. She

asked me how old I was. I said about 30. She said "oh" and then told me the job would be late at night and the shift would continually change, and that the neighborhood was really extremely bad. (She never told me which neighborhood it was.) I said she was still discriminating, because the amount of risk I wanted to take was my own business. She said, "Oh, all right, you can come in and fill out an application."

Call #4. Answering an ad under "Jobs — Male Interest" "Positions in data processing" (Listing agency — Robert J. Bushee and Associates, 300 Sixth Avenue Building, 471-5750)

I said I was inquiring about the data processing jobs. She said a woman (I can't recall the name) would call me back. This woman called me back. I said I was calling about the data processing ad. She said, "Yes, we have a receptionist job open in that field." I said, "I don't think you understand me, I am calling about a data processing job, which was listed under "male interest". She said a male counselor (whose name I can't recall) would call me. He never did.

You can see that when a woman calls for a job listed under "Female interest" she is taken seriously and asked for qualifications. When she calls for a job listed under "Male interest" she is given the run-around. The word "interest" does not do one single thing to alleviate the discrimination by sex fostered by separate job listings.

*Mr. Valadez*: Cross examination.

*Hearing of January 15, 1970.*

CROSS EXAMINATION OF SARAH MORTON

*By Mr. Volk:*

Q. Are you employed at the present time, Ma'am?
A. No, I am not.
Q. In the second job, where they said it was in a bad neighborhood, did you go to fill out an application?
A. No, I didn't.
Q. Do you know what the company was?
A. I know the advertising —
Q. But they did tell you to come in and fill out an application?
A. After a lot of harangue.
Q. Then it's a speculation on your part because you didn't fill out an application?
A. No.
Q. Now, on your third call, you said you they would give you an application, too; is that correct, Ma'am? The last one you talked about.
A. No, I never got an application. A man was to call me back. He never did.
Q. Did you make any further effort to contact them?
A. No, I didn't.
Q. You are a trained librarian?
A. Yes.
Q. You did call two libraries?
A. No, I called one.
Q. What did they tell you to do?
A. They told me to fill out an application?
Q. Did you?
A. No.
Q. You didn't know whether they would discriminate against sex?
A. It was under "Female." I doubt it.

Q. What was the second one?
A. Part time teaching.
Q. What did they tell you to do?
A. Fill out an application.
Q. Did they accept your application?
A. Yes.
Q. Did they offer you a job?
A. Not yet.
Q. What training, for example, do you have in computor science?
A. Two computer languages, one called — Comet and the other of which is a basic computer language.
Q. How many ads did you answer for computer programming?
A. I didn't apply for all of them. One of them was trainee. I don't know the most prevalent computer language, such as Cobol and Fortran. The computer languages I know aren't widly used.
Q. How many were in the Press for trainees?
A. I called all of them. That's all I got.
Q. How many of these did you actually put in applications for? None, is that correct?
A. One. I called two.
Q. Did any of these people tell you they wouldn't hire you because you were a woman?
A. No, they didn't. They probably would have a couple of years ago.
Q. Be that as it may, they did not. They did not tell you they would not hire you on the basis of your sex?
A. No, the didn't.
Q. You didn't put in applications at any of these companies?
A. Neither of the two. For the one.

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Q. That was under "female"?

A. On the two "male" I got no response. I got one after —

Q. Under "female" you got one application you put in, and you haven't heard from them either?

A. That's right, because it was "male."

Q. Do you feel they're discriminating against you because you are female?

A. The male help. The female help, I don't believe so.

Q. Why not? The result has been the same. You haven't got a job.

A. I haven't got one, because the male didn't come back. The other, I know the discrimination in Pittsburgh for librarians.

Q. Did you put in any applications or make inquiries for any other issues of the Pittsburgh Press other than January 4?

A. Yes, I have in past issues but I have never done it in a group.

Q. Was there anything special about January 4 that caused you to make inquiries on that date?

A. Yes, I was off for vacation. No, there was nothing special.

Q. Were you asked to do this for representatives of N.O.W.?

A. No. If I had, I would have kept better records.

Q. It's a coincidence because of the want ads used in the exhibit are January 4? It's a coincidence?

A. Yes.

*The Chair*: I have one question of the witness. You say you are a trained librarian?

A. Yes.

*The Chair*: What is your library training?

A. I have a Master Degree from the University of Chicago in Library Science.

*Mr. Volk*: May I add, I hope you find the job you seek.

A. Thank you.

*Mr. Valadez*: Leland P. Deck.

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LELAND P. DECK, having been duly sworn, testified as follows:

DIRECT EXAMINATION OF MR. LELAND P. DECK

*By Mr. Valadez:*

Q. Will you give us your name?
A. Leland P. Deck.
Q. Your address?
A. 120 Jefferson Drive, Mt. Lebanon.
Q. Your profession?
A. If it's a profession, I am a specialist in Personnel Management.
Q. And your employer is?
A. University of Pittsburgh.
Q. What are your — What do your duties at the University entail?
A. I am director of Personnel, Advisor to management on its policies, and Assistant Manager in carrying out the policies of the institution.
Q. In this connection, do you have responsibility for utilizing the services of the Pittsburgh Press?
A. Yes, I do.
Q. Has your institution ever had a complaint lodged against it by the Pittsburgh or Pennsylvania Human Relations Commission?

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A. I have had a complaint filed against me with the Mayor's Committee on Human Relations. I don't understand it to be a complaint originating with the Commission.

Q. Has the matter been resolved?

A. It has been resolved by negotiation, settlement.

Q. What was the nature of the inquiry of the complaint?

A. Well, as I understand, the complaint was that I was violating the Civil Rights Act by advertising in columns with a heading "Jobs for Men" or "Jobs for Women". And the settlement was that since it was necessary to get the kind of applicants we wanted to fill the vacancies which we have, it would be necessary to advertise where we would get the proper results. I found no suitable alternative but to continue advertising. The compromise was that we would put Equal Opportunity Employer lined in the ad. Sometimes we would put "Male" or "Female" itself if we were advertising in the "Male" Section or "Female" Section. That of course, compromise had increased my cost by about 10%.

Q. In other words, by compromising with the terms of the conciliation has been an expense to the University of Pittsburgh?

A. Yes, it has.

Q. Does the University of Pittsburgh, that is, the policy of the University of Pittsburgh, to comply with the terms of the Human Relations Commission's Ordinance?

A. It is our policy not only to comply with the terms but the principles and the purposes.

Q. The principles and the purposes, as you view them from the standpoint —

*Mr. Volk*: I object. He is asking him to make a legal conclusion as to the meaning and purposes of the Ordinance. And while I feel personally with Mr. Deck and have the highest regard for him, I don't think his meaning of the Ordinance is relative to the proceedings.

*The Chair*: Could you rephrase your question?

*Mr. Valadez*: Yes.

Q. Is there a way of alleviating the expense factor of the University and to comply with the nature of the conciliation?

A. Well, the newspapers could change its classification system and perhaps the new system would be without critics.

Q. When the present system is constituted, you have no option or alternatives?

A. I have no practical options or alternatives. It costs about $11.00 in advertising to get one new qualified employee on the job, if we advertise in the Pittsburgh Press. There is no other media where we could approximate the same results for the same dollars. Although there are other media, it would be much more costly.

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CROSS EXAMINATION OF MR. LELAND P. DECK

*By Mr. Volk*:

Q. Mr. Deck, who filed the complaint against you?

A. National Organization for Women.

Q. And with whom did you work out this compromise settlement?

A. With the staff of the Commission.

Q. Were representatives of NOW present?

A. They were not.

Q. Was any public hearing held on this?

A. No hearing was held.

Q. Was any court proceeding held prior to this conciliation?

A. No.

Q. Prior to the filing of the complaint, how did you list your want ads?

A. We would advertise for some jobs in the help wanted "male" sections. For some jobs we would advertise in both sections. For some jobs we advertised in the "female" section, and for some jobs we advertised in that neuter section, "male-female".

Q. Did you find this satisfactory?

A. We got the results for the cost of $11 per candidate. There were many cases where we had to advertise in two sections to get the results we wanted.

Q. Can you give us an explanation for that?

A. Well, of one is recruiting for a secretary and ninety-nine and nine-tenths percent of all secretaries in the community are female, we find we solve our problem by advertising in the section for females. If we are advertising for a engineer—we haven't even tried advertising in the female section on the presumption we would be wasting our money. If we are ad

vertising for a laboratory assistant, we may very well advertise one day in the male section, another day in the female section, and another day in the male-female section.

Q. May I ask, in that particular case, why you don't advertise in the "male-female" section?

A. Because that section, we believe, is looked at by job seekers for very limited number of categories of jobs and we do not want, as a public institution, we really don't want any job seeker who is qualified to miss an opportunity for a job as a laboratory technician because he or she failed to read seven pages of ads. We want to maximize our opportunities to select the best qualified candidate from a number of candidates.

Q. Thank you, Mr. Deck. I have nothing further.

RE-DIRECT EXAMINATION OF MR. LELAND P. DECK

*By Mr. Valadez:*

Q. If you had occasion, Mr. Deck, to advertise for an attorney or medical doctor, where would you place the ad?

A. I haven't advertised for an attorney. We have advertised for people with some legal training. I think the last one we hired was a woman, and I don't know where we placed the ad. But my presumption would be in certain professions, such as attorney, that if an attorney was looking at the ads they would look where they thought the ads would be, and I think they would expect the ads to be in the male section. So I think we would get the readership for both men and women by placing the ad in the male section. If we didn't succeed in getting qual-

ified candidates, we would advertise someplace else, probably in the legal journal.

Q. In the advertisements that you have placed in the past, both in the male interest and female interest, do you have any statistics to tell us how many females responded to the male interest columns and vice versa?

A. I don't have any statistics?

Q. If what we are seeking to accomplish is to get the maximum return on job applicants, would the same result be accomplished easier if the job classifications were placed in some order, alphabetical order?

A. I am not sure, but I do think if it were done that way, some of my clientele would be a little happier with me and could turn their harassment over to some other issue other than advertisement. I think it would be preferable for the society in which we live today to eliminate the classification system, which is really anachronistic. I think its offensive to a male nurse to have to look in the female section to have to find his next job.

*Mr. Valadez*: No further questions.

A. So I think there maybe should be a change by preference. If a change in the classification system is made. I prefer it would be a classification system so that people would not have to look through seven or eight pages of classifications on Sunday with great likelihood of missing the job which could make a desirable change in their career. I personally would prefer that one class be employees and one class be employment agencies. But I am sure the employment agencies would not like that. Another classification system that would be helpful

would be one section for professional and managerial jobs, that is classified under the wage-hour that is exempt or non-exempt. I think it would be easier to see the jobs. The other system would be alphabetical. But that's not really ideal. Let me give you my explanation. All advertisers, such as me, would like to get our ad as close to the top of the column as possible. So I worked out a scheme where we would start our ad "academic opportunity". And the following week the employment agencies advertised "academic opportunities". We are struggling for the same thing, where we get the greater return for our dollar. And that confuses people seeking jobs. And I don't think that's a perfect solution.

RE-CROSS EXAMINATION OF MR. LELAND P. DECK

*By Mr. Volk*:

Q. What about a system classifying jobs by physical or mental abilities required, such as heavy labor, light labor, clerical versus creative? Do you think a system of that kind would be preferable?

A. I think it would be difficult for many an applicant to find the ad for the job that is going to be the best for him under that system.

Q. Thank you, Mr. Deck.

*The Chair*: Call your next witness please.

*Mr. Valadez*: Dr. Sandra L. Bem.

*Hearing of January 15, 1970.*

DR. SANDRA L. BEM, called as witness for the complainant, and having been duly sworn, testified as follows:

DIRECT EXAMINATION OF DR. SANDRA L. BEM

*By Mr. Valadez:*

Q. Would you give your name?

A. Sandra Bem.

Q. Your address?

A. 2400 Marbury Road, Forest Hills.

Q. And your profession?

A. I am a college professor and research scientist in psychology at Carnegie-Mellon University.

Q. Can you tell us your educational qualifications?

A. Bachelor's degree from Carnegie Tech and Ph.D. in development psychology from the University of Michigan.

Q. Do you have an area of specialty?

A. Child development and in particular sex roles and sex differences.

Q. Are you currently in research?

A. Yes, particularly in the area of sex difference.

Q. Dr. Bem, in your opinion, are these fundamental differences between men and women which are relevant to the world of work in our society.

A. No, in my opinion, no fundamental differences exist between men and women. For my first line of evidence here, let me talk about the belief on the part of many Americans; that there is some relationship between sex and temperament. The noted anthropologist Margaret Mead has done a cross-cultural study in this area and has found that the relationships that many Americans believe to be sex related,

a relationship that says perhaps that men are more aggressive or independent, women are more gentle and nurturant, does not hold across cultures. She has found cultures for example where most of the men and women in the society tend to be passive, gentle, nurturant and dependent; she found cultures in which both the men and the women tend to be aggressive, competitive, independent and assertive; she found cultures in which the men tend to be nurturant, passive, dependent and the women tend to be aggressive, independent and assertive; and as well, she found cultures in which men are the independent assertive members, and the women the gentle dependent ones. So you see that if we think about temperament in these kinds of contexts, men and women across the world play all kinds of roles; there is no one way existing for a man and another for a woman.

But more pertinent to the question of the world of work in our society is another kind of line of argument. In earlier times, in a less technological society, there were fundamental differences between men and women which might have been relevant to the world of work. There is one fundamental difference which would have been relevant at that time between men and women and that's the biological fact of life that women become pregnant and can nurse children. Now in a less technological society that fact, that biological fact of life, has a crucial influence on what kinds of roles men and women can play. In earlier times women only lived half as long as they do today and during most of their adult lives were either pregnant or were nursing children.

Now that seriously limited their ability and seriously limited the kinds of roles in society that they could play; they were not free to be career-type people at all. You can imagine what its like to be pregnant or nursing most of your adult life — it seriously limits the roles you can play. But that's no longer the case in our society today. Women now live to age 74; they have almost complete if not complete control over their reproductive lives and this biological fact of life — the ability to be pregnant or nurse — no longer dictates in any way how they need to play. So today, in a society like ours, I think that basically this difference is rendered irrelevant. It is a fundamental difference, but it is no longer relevant in the kinds of roles men and women need to play. Its simply irrelevant.

In my opinion then there are only two jobs that I can think of for which it makes a difference whether one is a man or is a woman, and I'm not being facetious here at all. The only two jobs I can think of are those of sperm donor and wet nurse; it seems to me those are the only two kinds of jobs in which one's sex makes a difference. I would go so far as to say even some the jobs for which the EEOC have said that sex is a bona fide occupational qualification, that it really isn't. For example, let's take the position of lingerie saleswoman. The EEOC said that that is a position where it is all right to discriminate; to take only a woman and not a man. Notice that our cultural preferences really act in a very bizarre, irrational kind of way. We do not think that a gynecologist needs to be a woman. And yet that is an even more intimate kind of position

than a brassiere saleswoman. So once again we simply have some irrational cultural preferences that hang around. There is no fundamental reason why a woman needs to play one role and not another.

There are some other differences between the sexes clearly; men on the average tend to be larger and stronger than women on the average. But these are very different kinds of differences. When we talk about sperm donor or wet nersing, notice that there is no woman who can be a sperm donor; there is no man who can be a wet nurse. These are differences that apply to all men and women. When we talk about other kinds of differences like physical size or physical strength, what we find is that there is a tremendous overlap between the sexes. It is true that men on the average are stronger than women on the average, but there are strong women and there are weak men. What we need to remember is that there is even more variation within each sex on these other kinds of differences than there are differences between the sexes. So finally, in my opinion there are no longer today and fundamental differences between men and women which are relevant to the world of work in a technological society like ours.

Q. If there are no fundamental differences between the sexes, then what in your opinion is responsible for the stereotyping that some jobs are primarily of female interest and others primarily male interest?

A. I've already referred to an historical reason for that. Earlier in a less technological society it did

make a difference whether one was a male or one was a female. The fact is that pregnancy and nursing did dictate something about the role you had to play in life. I think that historical fact has lingered over today into the way we raise our children. I think child raising has a great deal to do with stereotyping — that some jobs are primarily female interest and others are primarily male interest. For example, in our society it's boys primarily who are given chemistry sets and microscopes, not girls. Imagine the situation when a boy comes home home from school all excited about a biology class. He's almost certain to think of becoming a physician. A girl who shows enthusiasm for biology is told: "Well, she might like to consider nurse's training later on, in case, God forbid, she ever needs to support herself". Notice that its a very different kind of encouragement to be taken. Its not surprising that when that boy grows up he thinks of himself as wanting to be a physician; when that girl grows up she thinks of herself as wanting to be a nurse. Or similarly, think of what its like for a little boy or a little girl who is interested in math or science. Children quickly learn their fathers know all about math and science whereas their mothers don't, and are often proud that they don't. Its not surprising that in the United States 25% of the boys, but only 3% of the girls, consider a career in science or engineering. By way of contrast, I'd just like to point out that these differences in childhood do really take a toll on who becomes engineers and who becomes physicians. In Russia one-third of the engineers are women; in America

less than one per cent. In Russia, 75% of the physicians are women; in America, seven percent of the hpysicians are women. So that has a lot to do with stereotyping that some jobs are for women and others are for men.

I'd like to mention that its not only parents but teachers that stereotype. The mass media get into the act too, and teach the same stereotype. If we look at movies, or magazine stories, we almost never see women in professional roles. Occasionally, when we do see women in a professional role they are typically unmarried, or unhappy. If we look at commercials on television I predict that within five years present-day commercials portraying women will be as offensive to us as reruns of Amos 'n Andy are today. And let me add this, that the help wanted ads play their part in teaching stereotypes to young children that there are jobs for men and jobs for women. Any little girl at this point who reads the Pittsburgh Press on January 4th who had high hopes of becoming a reporter or a writer was probably a little startled to discover that she has what is called "male interest". There's a tremendous stereotype for little girls and women who have so called male interests. It begins a devastating effect of what I may call a sense of inferiority. Its a terrible thing in our society and I'm sorry that it exists but in fact its a very negative thing for a person to suddenly be stigmatized with the label of an interest that's really appropriate for the opposit sex; is that really something you want to have? Let me talk about the result of this stereotyping, of what happens because we say that

this is male interest or female interest. The most devastating effect of a stereotype is a sense of inferiority that women and girls in our society come to have. This sense of inferiority — let me talk about this first — is something that showed up not in little girls but in little black children. Let me make an analogy here. In 1954 the U.S. Supreme Court declared school segregation to be unconstitutional. It cited a psychological study by Kenneth and Amy Clark who showed three-year old black children two dolls. The dolls were identical, except that one was black and one was white. The little children were asked which doll you prefer to have. The little black children chose the white doll. The court took this as evidence that somehow our institutions had taught those little black children that to be black was worse than to be white, and therefore they felt inferior. A very similar kind of study has now been done with women in our society, and we find almost exactly the same effect. A psychologist named Philip Goldberg asked a number of female college students to read and to rate articles from each of six professional fields. the articles were put together in two sets of booklets — the same articles. The only thing that changed from one booklet to the other was the name of the author. In one booklet an article was said to be by a man for example, John McKay; in the other booklet, the exact same article was stated to be by a woman author, John McKay. Each female college student was asked to read the articles in her booklet and to rate them for value, persuasiveness, writing style, professional competence, etc. As Goldberg had anticipated, he

found that female college students downgrade articles written by women. He kind of expected this for articles from professional fields generally considered the province of men, like law or city planning, but that the female students also down-graded articles from fields generally considered the province of women, like dietetics or elementary physical education. In other words, these female college students rated the male authors as basically better at everything. The sense of inferiority that our discriminatory system of male jobs and female jobs teaches clearly has its effect.

There's one other kind of study I'd like to talk about. Some women do emerge, despite all efforts to the contrary, with what are called male interests; some women do emerge who want to be doctors or want to be attorneys. A recent study at the University of Michigan found that even though they managed to retain their motivation for these kinds of careers, there had been serious psychological damage done to them. What they found was that women who did have so-called male interests had had so much social rejection on the way up the ladder, on the way up through the educational system, that they showed an unconscious desire to fail, to be done with it all. This was an effect that never showed up in boys, only in girls. What it showed up over and over again was that the kind of childhood we have, the kind of segregational jobs that we have, clearly ingrains a sense of inferiority, a sense of social rejection, in the girl who has any sense of wanting to profit from that other role, to do something that might

be called male. This is a strong stigma in our society and can't help but affect the psychological well-being of the girls in our society.

Q. In your discussions, Dr. Bem, you have compared sex differences with race differences. Respondent in answer to a complaint filed with the Pittsburgh Human Relations Commission questioned this analogy. In your opinion is this analogy a valid one?

A. Yes, in my opinion the analogy between sex differences and racial differences is a valid one. First of all, the same societal processes are responsible for forming and for perpetuating the stereotypes about things that are appropriate for men and for women and things that are appropriate for blacks and for whites. If we look, for example, at our educational system in our society, high school counselors have a large part to play in each of these situations. High school counselors counsel black students into vocational roles; they counsel female students into home economics, nursing and teaching, once again seeing appropriate roles for whites and males, other roles for blacks and females. The same processes are involved when we look at the kind of role models that are available for young black children and young female children. Its getting easier in the black situation now, but still there is difficulty for young black children to look at the world and find a successful black adult in the world of work that they can emulate, that they can strive to be like. It is even more difficult for the young female to find a role model. If we look into the media, we find that it is almost impossible for a girl to see a successful adult woman, in the world of work, unless she happens

to see Bernadett Devlin or Golda Maier on the six o'clock news. Notice, neither of them are American women. So the same kind of processes are responsible in each of the two cases for perpetuating the stereotype that there are things for female people, and these are different from the things for men and the things for whites.

Now, the analogy between sex differences is often questioned, but I think, on one particular basis. We have all come, in America, to recognize that the status of people in our black society is inferior. And once we recognize that point we set about trying to do something about it. I think the analogy is questioned because the inferior status of women in our society is not recognized or not often admitted We have an ideology in America that says it is not an inferior position, but a complementary position. We have a myth that says women are supposed to play serving roles to men. It is appropriate for a woman to play the role of nurse to a male doctor. We have this whole ideology that says women should play these roles, not inferior but complementary. Dr. Gardner's testimony was relevant. And from that chart up there, there is no question of the fact that women are inferior in our society. I think. Because this inferior status has not been recognized, people are hesitant to admit the analogy holds. But I think it does. The only difference I can see between the racial situation and woman's situation is the reaction of people to the discussion of it. We've finally reached the point in America, and it took a long time, where people don't laugh about the black revolution.

People recognize it is a serious question that must be taken seriously and something must be done about it. When we take the women's revolution, most people still react to it as if it is still funny. The situation is treated humorously, laughed off. But I think the reaction of America to the problem is the only difference. Other than that, I think the analogy is a strong one.

*The Chair*: I would like to ask the witness a question. For the citation to the Philip Goldberg study, before it slips my mind, can you give us a citation to that study please?

A. I can't give you an accurate one. A 1068 — I think I do have it at my feet. April, 1968, in Trans-Action.

Q. Dr. Bem, earlier you stated that the mass media help perpetuate stereotypes that some jobs are for women and others for men. Is there any evidence that sex-segregated classified advertising itself has this effect? Is there any direct evidence for this?

A. There is very direct evidence for this. My husband, who is also a psychologist at Carnegie-Mellon, and I did an experiment this week. It was suggestive in this respect. Let me say before I talk about it that it is not a conclusive study. It is not a very very strong evidence, but it is suggestive. We did it just this week and have not had time to analyze the data as to whether or not the results are significant —

*Mr.. Volk*: Therefore I am going to object to its introduction. I think we have had enough speculation without the introduction of a study that has

not been verified. I have objected to it. I think the Commission can view the conclusionary aspect of them as her opinions, but she is going to give her opinions as to an experiment that has not been concluded and without statistical significance. I think she is going a little too far.

*The Chair*: We will sustain the objection to this particular point.

*Mr. Valadez*: The objection is to the introduction of the report or comment on it?

*The Chair*: On the comment on the study that is not yet completed or verified. Let me make this comment, however. Naturally, we don't know how long these hearings may last. I hope it does not last a few weeks. It may, the way it looks. If the study is completed and verified, you may then have an opportunity to introduce it, subject to necessary objection. But at the present moment it does not seem to be in a position to be admissible for the record.

Q. Dr. Bem, independent of the report that you just discussed, do you have any other evidence that has bearing on this point?

A. I think the answer to this question would have to be no. There is no other actual evidence.

*Mr. Valadez*: Cross-examination.

*Mr. Volk*: I would like to have a recess before I cross-examine this witness, If I may.

*The Chair*: How much time would you like?

*Mr. Volk*: About five minutes.

(A five minute recess was then had.)

People recognize it is a serious question that must be taken seriously and something must be done about it. When we take the women's revolution, most people still react to it as if it is still funny. The situation is treated humorously, laughed off. But I think the reaction of America to the problem is the only difference. Other than that, I think the analogy is a strong one.

*The Chair*: I would like to ask the witness a question. For the citation to the Philip Goldberg study, before it slips my mind, can you give us a citation to that study please?

A. I can't give you an accurate one. A 1068 — I think I do have it at my feet. April, 1968, in Trans-Action.

Q. Dr. Bem, earlier you stated that the mass media help perpetuate stereotypes that some jobs are for women and others for men. Is there any evidence that sex-segregated classified advertising itself has this effect? Is there any direct evidence for this?

A. There is very direct evidence for this. My husband, who is also a psychologist at Carnegie-Mellon, and I did an experiment this week. It was suggestive in this respect. Let me say before I talk about it that it is not a conclusive study. It is not a very very strong evidence, but it is suggestive. We did it just this week and have not had time to analyze the data as to whether or not the results are significant —

*Mr.. Volk*: Therefore I am going to object to its introduction. I think we have had enough speculation without the introduction of a study that has

not been verified. I have objected to it. I think the Commission can view the conclusionary aspect of them as her opinions, but she is going to give her opinions as to an experiment that has not been concluded and without statistical significance. I think she is going a little too far.

*The Chair*: We will sustain the objection to this particular point.

*Mr. Valadez*: The objection is to the introduction of the report or comment on it?

*The Chair*: On the comment on the study that is not yet completed or verified. Let me make this comment, however. Naturally, we don't know how long these hearings may last. I hope it does not last a few weeks. It may, the way it looks. If the study is completed and verified, you may then have an opportunity to introduce it, subject to necessary objection. But at the present moment it does not seem to be in a position to be admissible for the record.

Q. Dr. Bem, independent of the report that you just discussed, do you have any other evidence that has bearing on this point?

A. I think the answer to this question would have to be no. There is no other actual evidence.

*Mr. Valadez*: Cross-examination.

*Mr. Volk*: I would like to have a recess before I cross-examine this witness, If I may.

*The Chair*: How much time would you like?

*Mr. Volk*: About five minutes.

(A five minute recess was then had.)

*Hearing of January 15, 1970.*

CROSS EXAMINATION OF DR. SANDRA BEM

*By Mr. Volk:*

Q. Doctor, how long have you been in practice. When did you graduate?

A. Three years ago, 1968.

Q. Have you been in research since then?

A. Yes, I have.

Q. You talked about the results of Dr. Mead's cross-cultural study. Could you tell us which cultures she discovered with male and female were equally — excuse me if I stumble over "passive-dominant"? Would you tell us what culture she found men and women equal in passive dominance?

A. Three cultures in New Guinea. They were the Camboli, Ari — I don't recall the name of the third. They were fairly closely located together.

Q. In one, the males were dominant. Childbearing females. In another, they shared the roles. And in the third, females were the aggressors?

A. Yes.

Q. They all occurred in New Guinea?

A. Right.

Q. Were they all Melanese tribes?

A. I can't answer that specifically. I think so.

Q. How large were the tribes?

A. I don't know.

Q. Did Margaret Mead have any explanation on the differences in the roles?

A. I don't think she offered anything historically. Her conclusion was that whatever differences result in terms, in terms of male-female differences, this is not biological but culturally produced. Her conclusion was basically that males and females, the tem-

perament of males and females are not formed at birth. The adult role conception for males and females is in a particular culture what boys and girls will grow up to fit, whatever the role conception is — that they are malleable at birth.

Q. Is it her conclusion, or your conclusion, that a culture must have role conception of some kind?

A. Let me speak for myself first. It would be my conclusion that there need not be a role differentiation. It is clear that in any society, roles must be fulfilled. There must be some kind of division of labor within a society that gets that. But not a difference between the sexes.

Q. Even though there is no role difference between men and women, that lack of difference would be determined by the upbringing of children?

A. Right.

Q. You stated there are cultural differences in role playing, adult visualization in American cultures caused by things like boys getting chemistry sets. Do you have any pre-puberty cultural influences that might cause this?

A. Certainly. If we go back to nursery school, little boys are punished psychologically for playing with dolls. Now I say I am concerned about this, and I think it is unfortunate, because little boys grow up to be fathers. By three or four they are already taught that to show affection for the symbolic representation of a child, usually a doll, is an unmasculine kind of thing. It is sometimes true that it is difficult for a man as an adult to show tenderness for his children. I think this is an unfortunate

thing. We need fathers who show concern and tenderness to their children.

Q. Doctor, do you have any others you can think of at hand?

A. One thing. You may find this too similar to the things I said earlier. When a little girl starts making plans about what she is going to be when she grows up, at every juncture, it is said to her she ought not to think of that seriously, because, after all, she will grow up to be a wife and mother. Every time she begins to make plans, somewhere some institution tells her that is not appropriate. Just as with a black child who decides to be a lawyer. It was in the biography of Malcomb X. He wanted to be a lawyer when he grew up. His teacher said, maybe you ought to be a carpenter; that would be appropriate. The same thing happens to a little girl.

Q. Is this also reflected in the courses you take at school?

A. We see recommendations again. Little girls and older girls are recommended in many school systems to take home economics. Junior high school boys take wood shop whether they want to or not. Unique potential isn't considered here. It is assumed, because they were born male or female, you have those interests.

Q. Is it your testimony that this then culminates in differences in job preferences among men and women in our culture?

A. It is my conclusion that this is one of the things that leads to the beginning of job preferences in men and women. In addition, we find that simply calling a job "male" or "female" also has an effect. For example, the job —

Q. I didn't ask you that. I am trying to get our culture straightened out a little bit. I gather your testimony concludes that cultural influences throughout a child's life tend to influence their role playing or role visualization?

A. Certainly.

Q. Does this manifest itself in job preference?

A. It has some effect on the average in the kinds of job preferences.

Q. If the cultural influences are that pervasive, that sinister, or all-encompassing of the child's development, would it not logically follow that it would manifest itself in an extreme degree of job preference, as a tangible manifestation of role visualization when a child reaches adulthood?

A. On the average I think that's probably so. But there are some diverse influences on children as they are growing up. We know that the primary effect of having a working mother in the home is that the daughter grows up having a conceptualization to be herself a working woman.

Q. Again, this is part of a child's personal culture? Perhaps I am not using the right terms, but do we not have the general culture of our society so that each child grows up in a home and has his own neighborhood culture. And it has its effect. I think that's just what you said about the working mother?

A. Right.

Q. Is it not true that certain professions are disproportionately represented by different religious and ethnic groups?

A. Yes.

*Hearing of January 15, 1970.*

Q. I have read where there is a disproportionate number of Jewish people who became attorneys.

A. Notice, we don't advertise for jobs with Jewish interest. But we could, since we know each group has its preferences.

Q. We could advertise for kosher resturants. We also advertise soul food and kosher restaurants and other appeals to ethnic preferences.

A. But we often do not. It is also true that there are ethnic differences not only in jobs but housing. Newspapers used to advertise housing for colored, housing for white.

Q. I don't wish to get into discussion of Jewish cultures. But we do have an area in Pittsburgh called Squirrel Hill. And an ad in Squirrel Hill might possibly be of more interest to a Jewish family than Italian.

A. I think your words were something like "disproportionate interest". Similarly an advertisement for clerical assistant would simply call for a larger number of female response than male. But you make a decision not to advertise "housing—Jewish", and let the applicants come as they wish.

Q. What I am trying to get from you is that cultures do reflect job preference.

A. Let me add one thing.

Q. No, let me continue. I ask the questions. You answer them. That may not be fair, but that's the way we run things in the United States of America. It does reflect a job preference, does it not?

A. Yes.

Q. For instance, there are very few Scottish priests, for example.

A. I don't, in fact, known the job preferences of Scottish people.

Q. There are more Irish priests because there are more Irish Catholics than protestants and these things do manifest themselves in job preference. And one thing that manifests itself is sex. We can conclude that?

A. Yes. One thing that reflects itself in job preference is also race.

Q. If your attorney wants to enter evidence to that effect, he may do so. For myself, I don't see where race has anything to do with job preference. How do you define sterotype?

A. A categorization, primarily. The connotative meaning includes a categorization beyond what is true.

Q. Are there cultures free of sterotypes?

A. Not to my knowledge.

Q. Isn't a stereotype indicative of all cultures?

A. Yes, or indicative of all cultures.

Q. You say that the only really bona fide differences between males and females are ones directly connected with the more obvious reproductive ones—bearing children and planting sperm and breast feeding? Do not these basic fundamental sexual differences cause much more far-reaching cultural ripples, such as, does not breast feeding and maternalism lend itself more to child raising by the mother, not the father?

A. Only when that connection is dictated by being pregnant all the time. There is no connection otherwise.

Q. I think we can take judicial notice that a child has to be generally kept by an adult until the age of six,

until the mother can get rid of him on the public school system? Doesn't that basic biological role take at least six years, and lead to the mother taking care of the child for at least six years?

A. Only to bearing the child and nursing it. It seems to me once that point is passed, there is no connection whatever between child rearing and sex.

Q. You don't think there is a cultural influence on the mother being the child bearer and staying with that child until school age?

A. I think it is convenient, but that is all.

Q. You have testified, I think, that there are in reality basic differences in physiques between males and females—that some of us more stereotyped people observe on the street — that males tend to be stronger than females?

A. Yes.

Q. It is not just that the average is a little greater. There is a severe difference, taken on any statistical average between the general strength of a male and general strength of a female?

A. I don't actually known what the averages are. Women weigh somewhere between 80 and upwards of 200. Men don't go as low as 80, up to 300. When we deal with distribution like that, averages are much closer together than the median.

Q. Do you known what the average or standard weight table of a woman 5 feet 8 is?

A. No, I never got that high on the table.

Q. Do you know what the standard weight table is for your height?

A. Probably about a hundred.

Q. Do you know what the standard weight table for a man of your height would be?

A. No.

Q. You don't look up on the table or crossways either. But does not a man of similar weight and height have a significantly higher physical capacity than a woman of the same height and weight?

A. I don't know the answer to that question. I suspect it revolves around muscles and exercise.

Q. How about bone structure?

A. I'm not an expert in that area.

Q. Are you aware of biological differences between male and female other than the obvious ones; the tendency of women to be knock-kneed and pigeon-toed slightly more so than their male counterparts; the tendency for a woman to throw a ball in that particular woman-like way because of bone structure in the arm rather than cultural type.

A. I am not an expert in the area of physical sex differences. I am sure there are others, as you mentioned, bone structure.

Q. I think you cited the per cent of women in Russia who are doctors. What was that?

A. 75%.

Q. What would cause that disparity between the United States and Russia?

A. With the revolution in Russia came the tendency to open up careers equally for women as well as men. Most jobs, to my knowledge, became accessible to women. The kind of socialization we have in America that makes a difference what sex you are was done away with.

Q. Do you know the per cent of female engineers in Russia?

A. Yes, I gave that. One-third to one-half.

Q. Do you know why there is that difference?

A. Apparently this is part of the Russian culture—because of the disparity.

Q. And this is a job preference in Russia. Apparently from viewing the statistics you presented, there is a tendency for women to be doctors?

A. I don't know if they advertise for doctors under a female interest heading.

Q. But there is an interest for females to be doctors in Russia?

*The Chair*: If the Chair could make a comment, one of the differences of job preferences in Russia may be attributed to the state directives and overall planning for social community. So that it could not be truly said it is a job preference. It is more a job allocation situation.

*Mr. Volk*: That may be so, sir. State directive, I think, is precisely what is at issue here today. A directive is an attempt by an organization to get the state to direct the newspaper to help them change the cultural patterns of our country.

*Rev. Johnson*: If another comment could come from the Chair. It has also been true that the overall cultural patterns of this country have also been responsible for abusing an awful lot of people, and I as a black man, can testify to this fact. And we as black people are demanding a lot of changes be made in this country. And I just direct that because culture has had a very direct effect on our people.

*Mr. Volk*: A reluctance of the Board to dismiss a complaint is not exactly sacrosanct, sir. I would readily agree with you that our culture has been something less than fair in its treatment of many groups. What we are saying, sir, is that social change of this nature is not the function of the want ad section of the Pittsburgh Press. If the legislature wants to change the law prohibiting want ads as being classified in a certain way, that is something to be done by thé legislature. There is nothing in the law directing the Pittsburgh Press to produce its ads in any given way and we do not feel the necessity for bearing the burden of any particular kind of social change which we personally may not either agree or wish to become a part of. So we think that the racial analogy, which we will hear over and over in this situation, is not analogous and is not a relevant one. There are legitimate differences between men and women where there are not legitimate differences between the races. And we feel while we may all strive for perfect integration, our witness has just proved that all cultures have stereotypes. And you, sir, with your personal interest and legitimate concern, and me with my support of your aims, are not going to produce this bland homogenous culture we may visualize. Cultures have their effect. To influence a child to abandon his role playing as a man or woman and assume a new stance is just as much a cultural force, which might be just as bad as forcing him to take a contrary position. We don't think the place to fight the battle is in the want ads of the Pittsburgh Press.

*Mr. Volk*: That is all of this witness.

*Hearing of January 15, 1970.*

*The Chair*: Let me say one thing. The iss here is not whether the social model for sex equ ity is to be won in the Pittsburgh Press columns any one else's columns, but mere matter of fa whether or not the present practice of the Pitt burgh Press is violative of the ordinance. And wh we try to do as the panel is get all the informati so we hopefully can make an intelligent recomme dation to the Commission how to dispose of th case.

*Mr. Volk*: Sir, I agree with every word th you said.

*The Chair*: Will you proceed?

*Mr. Volk*: I am finished with this witness.

*The Chair*: You are finished?

*Mr. Volk*: Yes, sir.

*Mr. Valadez*: One question, Dr. Bem.

Q. Has any portion of the study that you mention in my last question to you been completed to t extent that you can make a comment on the effe that sex-segregated want ads might help perpet ate —

*Mr. Volk*: I'm going to renew my objection.

*The Chair*: Would you repeat the question?

Q. Mr. Chairman, I'm asking whether any portion the over-all study that Dr. Bem is engaged in h been completed, and to what extent we may draw

*The Chair*: Well, if you split your question and I am not suggesting to you how to ask que tions — is any portion of that study completed?

Q. Is any portion of the study completed Doctor?

A. Yes.

*The Chair*: Could you describe that portion that is completed?

A. Yes. We were able to compare — I will have to give you a little background to have this make any sense. What we did was take advertisements from the want ads of the Pittsburgh Press of January 4, 1970, under jobs listéd "male interest". We then asked a group of high school girls to rate those jobs in terms of how much interest they had. These were jobs from the "male interest" column. One set of the girls got the jobs in the same format as the Pittsburgh Press listed them, with a large disclaimer that says exactly what the Pittsburgh Press says there is no discrimination in hiring and you can consider any job. One set of girls saw those advertisements listed under jobs —. Another set of girls saw those jobs mixed up with female jobs taken from the female column, listed in order. So the girls were asked to read all the jobs and rate them. How much you would be interested in them. What we found —

*Mr. Volk*: Objection.

*The Chair*: O.K. Did you say this was not evaluated yet?

A. This part of the study has been evaluated.

*The Chair*: What is the finding, not the opinion?

A. Certain jobs we listed under the label "jobs — male interest" were downgraded by the female students.

They got a lower interest rating than when listed in an integrated list. Some having the male interest label there, had the girls to list them that way even if the job was simply listed "jobs available".

*The Chair*: That is enough. There was an objection to the report as not being completed. The question asked was, what was completed? What was found? As I indicated before, if sometime by the end of this hearing that report is completed and evaluated, then subject to your objection it may be reintroduced.

*By Mr. Volk*:

Q. What was your statistical correlation?

A. The difficulty is we do not know which jobs showed this deviation and which did not.

Q. How do you know if there was a statistical correlation if the data have not been evaluated?

A. The difficulty is that all jobs did not move in the same direction. We have some judgment to make as to what that means.

Q. You take the January 4 as the data?

A. We didn't use all of the jobs. That was the set of jobs from which we selected.

Q. May I ask why you picked that particular day?

A. We were going to run subjects — we had to wait for the new semester to get subjects. We don't get the Pittsburgh Press regularly.

Q. Are you a member of N.O.W.?

A. I have been in the past, but that would be a technicality. I haven't paid my dues. I don't know whether I am a member now.

*By Mr. Valadez:*

Q. Were you asked to make this study for purposes of this litigation?

A. No, we were not.

*Mr. Valadez*: No further questions.

*Mr. Chair*: Would counsel like seven minutes recess?

(A seven minute recess was then had.)

*The Chair*: Will you please come to order?

*Mr. Valadez*: Catherine East.

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CATHERINE EAST, called on behalf of the complainant, and first being duly sworn, testified as follows:

DIRECT EXAMINATION OF CATHERINE EAST

*By Mr. Valadez:*

Q. What is your name?

A. I am Mrs. Catherine East, opposite of west.

Q. And your address, Mrs. East?

A. Labor Department, Washington, D.C.

Q. And your exact job title?

A. I am Executive Secretary of the Interdepartmental Committee on the Status of Women and Executive Secretary of the Citizens' Advisory Council on the Status of Women.

Q. Can you tell me the functions and membership of the two groups on which you serve as Executive Secretary?

A. These two groups were established under Executive order 11126 of the President. The Interdepartmental Committee on the Status of Women is chaired by

the Secretary of Labor. It includes the Secretaries of Labor, of the Departments of Health, Education and Welfare, Department of Defense, State Department, Agriculture, the Attorney General, Director of the Office of Economic Opportunity, Chairman of the Civil Service Commission, and Director of the Office of Economic Opportunity. Its purpose is to coordinate the efforts of the Federal Government to improve the status of women. The Citizens' Advisory Council on the Status of Women was created by the same order, is made up of 20 private citizens appointed by the President. The purpose of the group is to advise the Interdepartmental Committee, to serve as a liaison with private groups and to consider new developments and problems as they arise, and to make recommendations for action to the interdepartmental committee and to state governments to which they serve as a liaison.

Q. Has the Committee or the Council taken any public actions relative to classified advertising?

A. Yes, sir. Subsequent to the enactment of Title II of the Civil Rights Act of 1964, which prohibited discrimination because of sex as well as race, color, creed, and national origin. The Advisory Committee set up a task force of its own members to study major policy issues under that law and made recommendations for action. One of the subjects they considered was classified advertising. And they adopted a recommendation that the sex-segregated newspaper columns must be discontinued. They said — and this was published — "The Council is alarmed at the lack of compliance with this provision (this

was written about three months after the law was in effect — it came into effect July 1, 1965) as evidenced by the continued advertising in sex segregated newspaper columns. Separate "help wanted — men" and "help wanted — women" columns in newspapers serve only to advise prospective job applicants not to apply where they are not wanted, thus perpetuating discrimination. Moreover, sex segregated newspaper columns —

*Mr. Volk*: I am going to object, in that I don't see how this is relevant in the proceedings before us. In pre-hearing sessions, the on again, off again EEOC guidelines, some of which permitted the type of segregation that the Pittsburgh Press uses and then they would prohibit it. When we bring this up, we are informed this is a federal act and this is the city of Pittsburgh. And we are concerned with a violation of an ordinance of the city of Pittsburgh. With all due respect to our distinguished visitor, I don't think her testimony is relevant to the proceeding before us.
Could I speak to the on-again, off-again? I have a little nowledge of that.

*The Chair*: To rule on your action — although, true, the proceedings are under the City of Pittsburgh's ordinance, for our edification we would like to admit this testimony and grant you an exception and to hear what the witness has to say. It is true that some of the EEOC rulings may not be binding on the city. I am not sure. We will have to get legal rulings from our legal counsel at a later date. However, since the City of Pittsburgh is part of the

Commonwealth of Pennsylvania, which is a part of the United States of America, we would like to be enlightened on the national policy. So the motion is denied.

Will you please proceed. And may I ask that you speak a little louder.

A. I will finish that quote I started from the Council's findings. "thus perpetuating discrimination. Moreover, sex segregated newspaper columns actually encourage employers to place a sex label on jobs which unintentionally restricts the employment opportunities of both men and women". The Council is quite concerned by the fact that if the employers had to put their jobs in one column they might stop to think of why they prefer one sex to the other. And if they really thought about it, they might decide not. Employers have been advertising for accountants in the male column, and employing male accountants. If you had to include it in a single column and a woman applied who is a CPA, and well qualified, maybe you would stop to think, "Maybe we will hire her". The federal government immediately stopped indicating sex in its advertisements.

Prior to that time they had a discriminatory policy. And I worked for the Civil Service Commission many years, so I have more than adequate knowledge in that field. The first thing they stopped doing was including in their announcements the mention of sex. The Council is also particularly concerned, because three months prior to this time the study was published, the Equal Opportunity

Committee had held that columns, that race, that you cannot have columns separated by race. They said it is a violation of 704b to specify colored or white in help wanted ads or permit ads to include sex. Since sex and race were in the same sentence, you couldn't treat them differently, They endorsed this recommendation and forwarded it to the Equal Employment Commission for action. Now they did not adopt this at that time. They have since. We also made recommendations on bona fide occupation qualifications which the Equal Employment Opportunity Commission adopted immediately and since has been upheld by the courts. The basic most important sentence in that recommendation was this: "The Principle of non-discrimination requires that each person be considered on individual capacities and not on the basis of any characteristic generally assigned to the group". This is the basic philosophy.

*Mr. Volk*: What document?

This is a recommendation to the Equal Employment Opportunity Commission for interpretation of Title VII, enforced by the Interdepartmental Committee.

*Mr. Volk*: You said it was enforced, upheld by the courts.

This general principle has since been upheld by the courts. The Fifth Circuit Court of Appeals said, "We conclude that the principle of non-discrimination requires that we hold that in order to rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women

would be unable to perform safely and efficiently the duties of the job involved". And this was a job that required physical capacity. A physical capacity that some women would not have. The judge went on to say, "It does seem that switchmen are occasionally subject to late hour callouts. Of course, the record also reveals that other women employees are subject to call after midnight in emergencies. Moreover, Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring, or unromantic taks is worth the candle. The promise of Title VII is that women are now to be on equal footing. We cannot conclude that by including the bona fide occupational qualification exception, Congress intended to renege on that promise". That is from the Fifth Circuit Court of Appeals. And they are seldom overruled in the Supreme Court.

In Cheatwood v. South Central Bell Telephone and Telegraph Company, which is also in the Fifth Circuit Court—this involves a job where a woman was to be considered for the position of commercial representative, a position which—

*Mr. Volk*: Again, I don't wish to be pettyfogging. This is a legal argument. These are legal cases which are being quoted into the record by a witness who has not established herself as being learned in the law. I think they are more appropriate for the arguments, not their witness' intermin-

able statements, which are nothing more than the readings of governmental reports and court cases, which can certainly be incorporated in the evidence in documentary form. I think the witness should be somehow restricted to testifying to facts she knows rather than the reading of governmental reports.

*Mr. Valadez*: May I ask a question at this point?

y *Mr. Valadez*:

. Are you an attorney?

.. No, I am not. I have considerable knowledge on this particular point, but I am not an attorney.

. Do you have—could you tell me who appoints the Citizens' Advisory Council?

.. The President appoints the members.

. President Nixon?

.. Yes.

. Could you tell me one or two?

.. Mrs. Virginia Allen, former president of Business and Professional Women's Clubs. She is president of a drug chain in Detroit and has a long history of spending a great deal of time to improve the status of women. Dr. Cynthia Wedel. She was recently elected Chairman of the highest office in the Episcopal Church. We have had union members, Dr. Richard Lester, Professor of Economics, Princeton University, Executive Director of the National Council of Catholic Women. Dr. Henry David, Head of the Office of Science Resources and Planning of the National Science Foundation. We have had university presidents. It tends to be a group of dis-

tinguished people who have some expertise on the status of women.

Q. You have made some suggestions as to classified advertising. In your position as Executive Secretary to the Committee and the Council, do you have any personal knowledge of any newspapers that have switched to single column classified advertising consistent with the recommendations?

A. Yes, we have. This is not based on any survey, extensive survey. These are newspapers I learned about largely through word of mouth from friends who know I am interested in this area. I called to verify them. First, it was the Tribune. The classified ad manager there told me about the Baton Rouge State Times. He told me about the Lafayette Journal. Of course, the New York papers had to change their system because the city consumer affairs commissioners said they had to. They did. Then Newsday after the New York city newspapers changed to single line advertising. And they said in a memo — Don Gross, the research analyst in advertising sales, said on February 10, 1969, Newsday started running all classified help wanted advertisements without male, female classification. There were no difficulties with our advertisers.

*Mr. Volk*: I am going to object to this as hearsay.

A. This was introduced in the OFCC hearings. It's in the transcript.

*Mr. Volk*: We don't know the condition under which the question was asked. We were not there to cross-examine them.

*The Chair*: Do you have objection to the listing of the newspapers?

*Mr. Volk*: No, but what this man said as to the ease of doing this. As a matter of fact, we find this as a help, not a hindrance.

A. New York Times, Wall Street Journal, New York Daily News, Law Journal, Newsday, New York Daily Post, Oakland Tribune, Baton Rouge State Times, and Lafayette Courier Journal. This is not based on a survey. These I just picked up. But I am positive each one of these has desegregated their ads.

). Mrs. East, has the Committee or Council developed any evidence as to economic discrimination against women?

. Yes, this is one of the things we are interested in. We have some charts here relating to the statistics showing that the economic discrimination on sex is greater than economic discrimination on race is.

The median earnings of year-round fulltime workers clearly indicates the extent of sex discrimination in employment. The gap between men's and women's earnings is widening, as can be seen from the first chart. You can see, contrary to the mythology, the earnings of white women (this does not include any part-time people) are lower than non-white men. The earnings of non-white women is way down at the bottom of the heap. Chart 2. One of the reasons the gap is widening is the decreasing percentage of women in professional and technical jobs. The percentage in service workers has been steadily increasing. Chart 3. You can see from this

that women are concentrated in the lower paying occupations, where the median earnings are low. Private household workers are low, $1200; other service workers, $2800; salesworkers $3000; operative $3300; clerical workers $4200. These are median salaries—half the workers earn more, half earn less—for women full time year round workers. Chart 4. The difference between men's earnings and women's earnings by educational achievement is astonishing and is shown on the next graph in chart 4. The dotted line on it is at the level of the median earnings of women who have completed four years of college. Following that line across, you will note that men high school drop-outs earn more. You can also see that women high school graduates earn less than men with only 8 years of education. This in spite of the equal pay for equal work laws—it means that "women's jobs" are low paying and inferior to men's. Chart 5. The next chart, number five, gives a good idea of why women work. 24% of the women working in 1965 were single; 18% were widowed, divorced or separated; 11% had husbands earning less than $3000 per year; 13% had husbands earning between 3 and 5 thousand a year. The remainder—about one third—had husbands with incomes greater than $5000. So you can see that for at least two thirds of all the women who work, working is an economic necessity. They have to. Chart 6. Another way of illustrating the economic discrimination against women is the subject of the next chart, six. Almost 30% of all year-round, full-time women workers earn less than $3000 per year. —that is, are below the poverty level—whereas

11% of men are in this category. 42% of women earn between 3 and 5 thousand, as compared with 19% of men. When we get to 5000 a year and up the situation is reversed. 27% of men earn between 5 and 7 thousand, 20% of women. 43% of men earn more than $7000 or more, but only 9% of women. Chart 7. This chart shows the small percentage of women in some professional careers—1% of federal judges, engineers about 1%, lawyers around 3 or 4%, physicians a little higher at 7%—which is a little surprising. People often say, people who are uniformed, that women don't go into medicine because it takes them so long to finish—but there are more women in medicine than law, and law doesn't take so long. I think the difference probably is that there is more discrimination in law schools than in medical schools. Among the scientists—very small. The university faculties—22% are women—looks pretty good until you look at the details shown on the next chart. Chart 8. A survey was made of all the graduate schools of sociology with these results: 35% of MA candidates are women, about 30% of PhD candidates; 27% of Instructors; 15% of Assistant Professors; 10% of Associate Professors; 5% of Full Professors and one out of 120 Department Heads are women. And sociology—dealing with people—is supposed to be a "women's" field. You can imagine what it is in engineering. Chart 9, families headed by a worker. This does not include families on welfare. The two circles on the left are white families. Of white families headed by women 19% are poor while of families headed by a man, 7% are poor. Among the non-white families

headed by a woman, 53% are poor. Among those headed by a non-white man, 29% are poor. In families headed by a man, both white and Negro men, the percent had gone down considerably since 1966, but there is no decrease in families in poverty headed by a woman. I suspect some of that is directed to the fact that Manpower leans towards training men.

*Mr. Valadez*: If the Chair pleases, we offer these as exhibits.

*The Chair*: Do you have replicas in a smaller size to offer into the record?

*Mr. Volk*: For the record only, I object to the relevance of any of these statistics as not being germane to the issue, whether or not the Pittsburgh Press by its want ads is violating the Pittsburgh Human Relations Ordinance.

*The Chair*: Your objection will be noted. Do you have any cross examination?

*Mr. Valadez*: Cross examination?

*The Chair*: Before you do cross examine, I want to ask one question of the witness.

On the Citizens Advisory Council, was any member of the so-called fourth estate asked to participate?

A. No, and I don't believe there is any member of the fourth estate on the Council.

*The Chair*: None was asked and none is on the Council?

A. The EEOC met with the fourth estate before they made their ruling—

*Mr. Volk*: Which one. First, second or third.

*By Mr. Volk:*

Q. I am sure I got all your credentials, ma'm. Are you a government employee?

A. I am a career employee, 30 years service. This job is more than full-time. I spend about 15 hours a day on this.

Q. I didn't know if this were a volunteer organization.

A. It was formed by an executive order of the President. The Citizens' Advisory members are volunteers.

Q. And you get paid?

A. I am the only full-time paid member besides the Secretary.

Q. You said that want ads encourage women to take one job or another. How do you know this? Do you know if there are some statistics or observations?

A. Its an observation women generally make, sir. And they feel they have been discouraged from applying for jobs. Women are brought up to be, they're socialized to be a little shy about these things. Few of us manage to escape this.

Q. This is your speculation.

A. Women's groups have felt this way a long time, long before 1967. They felt this did hurt women's opportunities.

Q. May I ask your educational qualifications?

A. College graduate, Marshall University, in English. Its so far back its hardly pertinent. My experience would be more pertinent.

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Q. You said the Government passed this before they decided, before the Civil Rights Act was passed, to take from its announcements and mention of sex. Do you have any information on that, things that have changed, statistics to show any change in the percentage of women in various jobs because of this policy?

A. When a change takes place—

Q. Do you have anymore civil engineers than in 1963? If so, how many?

A. The most significant changes have been in what we call our trainee type jobs. The college graduates coming in. We hold a Federal Civil Service examination for which any college graduate may apply. The percent of women hired from that examination for professional and administrative jobs has gone up from about 17% to 30%.

Q. But are those jobs advertised per se? Do you advertise for a J.M.A.?

A. That was the old exam.

Q. You don't advertise for chemists? Or what have you?

A. Well, do you mean management or —

Q. Do you have any statistics whether your advertisements for civil engineers, typists, stenographers, ecologists, all of the other professions that are hired by the Government has changed in the rate of men and women as a result of this policy?

A. There is data. The Civil Service Commission usually analyzes that. They noted a significant change in management jobs.

Q. Have there been female guards appointed yet for male prisons?

A. No. However you advertise, if you select by sex the result is the same. We are employing policewomen in the District of Columbia, and the number has gone up.

Q. There is nothing new about policewomen.

A. They are being hired for doing more than "female" work.

Q. Do they patrol?

A. I suppose.

Q. In a patrol car?

A. They have them in New Orleans. In our building we have women guards wearing uniforms and carrying guns. Just don't come in and try to rob us. I suspect they'd get you. They get the same training in pistol practice as men do. I asked the women about it.

Q. Now you caught us lawyers a little flat footed here because we are not aware of any court of competent jurisdiction that has upheld any ETOC guidelines or rule being effective, with the possible exception—

A. The Seventh Circuit Court that goes to BFOQ.

Q. It goes to BFOQ, but it doesn't go to the guidelines. Or does it?

A. The court determines how much effect they will give to them.

Q. Precisely, and these courts have to determine guidelines based on its own case.

A. That's right.

*The Chair*: Excuse me. What is B.F.O.Q.?

*Mr. Volk*: Bona fide occupational qualification. Which in the moral philosophy of EEOC is limited to male washroom attendants and male actors for

male parts. They allow very few others, if any, including a cocktail waitress. You can't be a cocktail waitress because the customer likes pretty girls. That's not a bona fide occupational qualification.

A. Sir, the Fifth Circuit Court of Appeals took the same view — in the Weeks case.

*Mr. Volk*: I am familiar with that. The rest of the job was a manipulative, minor technical function that did not substantially involve any physical exertion whatsoever.

A. I think its more indicative in the statement, "We conclude that the principle of non-discrimination requires that we hold that in order to rely on a bona fide occupational qualification exception, an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved".

Q. We haven't legislated customer preference yet.

Are you aware that of the newspaper which you cited, which have changed, only the Lafayette Journal and the Baton Rouge Times and the Oakland Tribune are outside of New York? The rest are inside the confines of the City of New York?

A. Newsday is in Long Island. It is not subject to the law. I believe the Wall Street Journal did it before they had to.

Q. The data you pointed out — where did it come from?

A. From the Bureau of Labor Statistics of the Department of Labor or the Bureau of the Census, There's also some from the Women's Bureau.

Q. One absence I noted was a comparison of your statistics with the percent of adult women actually in the labor force as compared to the men in the labor force.

A. It is about 50% of adult women in the labor force between 18 and 50.

Q. What about the male?

A. Its much higher.

Q. That alone would account for a disparity in the labor force or any profession.

A. Not to the extent represented.

Q. But without that percent, your statistics are exaggerated. They don't reflect the true position of women in the country. They don't reflect the per cent of women in the labor force.

A. If its better than it looks, that's all to the good. Its still not good.

Q. It does not take into account marriages, drop-outs, women who do not want to work.

Now, your college statistics; you have a lot of Ph.D. candidates who don't go on to be Associate Professors.

A. I think I said that the data on Ph.D.'s — its somewhere around 87%. Its higher than men, even at the average where they would have small children. They do have children, but they don't stay home. A Ph.D. is a women who is highly motivated.

Q. Is it your contention that there is a large body of Ph.D.'s seeking positions in colleges who are denied?

A. Definitely. I see them constantly. There is a woman in Washington now preparing a case against the University of Maryland. They take men with lesser

qualifications. There are some sitting in this room who have great difficulty in finding positions.

Q. In education? In teaching?

A. Yes.

*Mr. Volk*: May we confer a second?

*The Chair*: We will recess for two minutes.

(A two-minute recess was then had.)

Q. Are you familiar with the House Judiciary Committee's Report No. 914 of the Civil Rights Act?

A. Is that the one that reported on the bill, Title VII?

Q. Yes.

A. I am familiar with that.

Q. Are you familiar with the section of Title VII that says "A prohibition of this section does not require newspapers to exercise any control of supervision over, or do any screening of, advertising notices published by them". Are you familiar with that section?

A. Yes. I don't think anybody ever said they should screen them. We at the Council never asked they screen the ads, just that they go to one column. This is on the Federal side; I'm not familiar with the Pittsburgh Ordinance. If any employer risks assuming it is a BFOQ, it is his responsibility.

Q. EEOC can tell a newspaper how to classify their ads?

A. No, they can't tell them. They can issue guidelines which may have some effect on how the courts decide.

Q. Are you familiar with the American Newspaper Publishers' case?

A. Yes, I am.

Q. Are you familiar with the ruling in that case, which I understand has not been contested by the EEOC — that the guidelines do not have the force and effect of law?

A. I don't think anybody has ever claimed the EEOC has the effect and force of law, anymore than the Federal Fair Standard Labor Act — the courts usually give them some weight.

Q. The Fair Standard Labor doesn't issue guidelines. They issue opinions.

A. The courts give them considerable weight. So far, the BFOQ — the advertising thing has never been considered. It's been held up on procedural technicalities for years.

Q. I guess there's truth to that.

*The Chair*: May I ask a question, Mr. Volk? Is that a reported case on EEOC? It's still in litigation?

*Mr. Volk*: Yes.

A. I don't think the EEOC ever claimed they have the effect and force of law. Fair Standard Labor can't issue anything as the force and effect of law.

*The Chair*: Is the issue whether the guidelines would have the force and effect, say, like forcing regulations under the Food and Drug Act?

. The EEOC doesn't have that power.

*Mr. Stickle*: The Equal Employment Opportunity Commission has exceeded their statutory authority in even promulgating a guideline.

. The newspapers don't think they should even do that.

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*Mr. Stickle*: We don't have anything against their having proper guidelines for them, but when they promulgate their guidelines and call them regulations, speak in forceful tones, and have them published in the code of regulations, in which only then which have the force and effect of law, we feel, and it is our position, that they are misleading the public in forcing the public into believing it is law they are reading rather than guidelines for the commission.

A. Women get a little concerned because the newspapers did not object to a similar ruling on race, within three months after the law went into effect. We think they are the same.

*Mr. Stickle*: I am not familiar with that ruling.

A. I read from it in my testimony.

*Mr. Volk*: I think the whole field is totally far afield and irrelevant. If you cross examine on an irrelevant question you get an irrelevant answer.

*The Chair*: Mr. Valadez, do you have any more questions.

*Mr. Valadez*: No further questions.

*The Chair*: Do I understand you have no further witnesses until tomorrow morning?

*Mr. Valadez*: That's correct.

*The Chair*: This hearing stands adjourned until 10 o'clock tomorrow morning in this room.

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FEP Case no. 558 — NATIONAL ORGANIZATION FOR WOMEN vs. THE PITTSBURGH PRESS.

Friday, January 16, 1970.

*The Chair*: Will you call your first witness, please.

*Mr. Valadez*: Sandra Sheeran.

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SANDRA SHEERAN, having been called as a witness on behalf of the complainant, and having been duly sworn, testified as follows:

DIRECT EXAMINATION OF SANDRA SHEERAN

*By Mr. Valadez*:

Q. Will you give the Commission your name and address please?

A. Sandra Sheeran, North Dithridge Street.

Q. What is your occupation?

A. I work part-time at present for my father doing research and typing. He is a professor.

Q. Do you have any other qualifications?

A. I have a Bachelor's degree, and that qualifies me to do some work in the social field, which I am interested in.

Q. And have you had the occasion — strike that. You are not a member of N.O.W., are you?

A. ?? ??? ??? ??? ??? ???? ??

Q. Sandra, did you have occasion to use the facilities of the advertising section of the Pittsburgh Press any time prior to this date?

A. Yes, on Sundays I usually look through them. I usually just look at the female. Once in a while I

look at the male because I generally feel intimidated by looking at the male. I feel if I call them that there is more of a chance than not that they might not hire me if they put it under "male."

Q. In the field you are looking for, do you find under female interest column as many opportunities to seek your type of job as there would be under male interest?

A. I think combined there would be more if they were not male and female jobs in social work together.

Q. I see. As they are listed at the time you viewed the ads, were there more under the male interest column that would suit your purpose?

A. I don't know if there were really more under the male interest. I am not just interested in social work itself. In the field I am interested, if I can't get the job I want in social work, I am interested in management and this kind of thing, and there is more under male than female.

CROSS EXAMINATION OF SANDRA SHEERAN

*By Mr. Volk:*

Q. What is your B.S. or B.A.?

A. B.A. in history.

Q. You are trained for some work in social work?

A. You don't have to have a B.A. in social work.

Q. Are you familiar with the type of agencies that employ social workers?

A. Yes.

Q. Who employs social workers?

A. Department of Public Assistance of Allegheny County, Community Mental Health and Retarda-

tion Center, Presley House, Kingsley House, Eastern Seal Society.

Q. In other words, mostly public or quasi-public institutions. Governmental agencies; is that correct?

A. That's correct.

Q. Have you applied for a job as a case worker with the Department of Welfare?

A. Yes.

Q. Were you accepted?

A. I was — I passed it — I passed the examination. This was in September. They had four hundred people that were being interviewed for it. They only take 50. My score was not high enough to be in the 50.

Q. Have you applied to the Juvenile Court?

A. They discriminate against women.

Q. How do you know that?

A. I talked to the man there. They have two male and two female, and they usually want male over female to take care of juvenile delinquents.

Q. Are you familiar with the ratio of male versus female as case workers?

A. I have a friend who works for Juvenile Court. Apparently they eliminated female. If they leave, they don't hire another female. They hire a male.

Q. Have you filed a complaint with the Human Relations Commission against the Juvenile Court?

A. Yes, I have.

Q. Have you filed a complaint against any other organization or association with the Human Relations Commission?

A. No, I haven't because generally I hate to complain about something. But Juvenile Court was just so

blatant about this discrimination they almost forced me to complain about it.

Q. Have you applied to any of the hospitals?

A. Yes, a lot of them require M.S.W.s.

Q. You did say you do look in the male help wanted ads?

A. Right.

Q. What type of management job would you like to have?

A. I suppose something in advertising. Any type of management in advertising. I don't know the field that well. I know social work much better since that is what I have been interested in. The job openings for bachelors in social work aren't that great. By the end of February, if I don't get what I want in community mental health, I will be looking further into management.

Q. What are you looking for in management? What would it entail?

A. I am not sure exactly. It is a lot more interesting. My father is in management. I do work efficiently in delegating authority. It is about the only thing to go into. I don't know that much about it. But I am not interested in science and this is what most male students who have a B.A. go in to. I don't know exactly what field. I presume advertising. I don't know that much about advertising.

Q. Have you made any attempt to use your history degree?

A. Yes, I would like to teach it, but I don't have my degree in education. I applied to Catholic schools, but at that time they didn't need anyone.

Q. Do you feel if you applied for a job in management, do you think you would be discriminated against because you are a women?

A. I think so.

Q. Do you think it would be any different if it were classified under "M" or do you think there would be any difference in the employer's mind?

A. I would feel much better.

Q. I didn't ask you "male—female." I mean eliminating, no section headings on want ads. Do you think this would have any effect on the manager who will be interviewing you?

A. I think it would to some extent. If they just have it under "male" and you call, it's a little easier for them to say they don't want you if you are a female. If it's not under anything, they say it's a job that they think only a male could handle. I think it's much easier for me to complain about it if it weren't under male interest.

*Mr. Volk*: I would, of course, ask the Commission to ignore the total testimony of this young lady as being capable of proving nothing. It is not relevant to the matter before us. She has testified that only to her own personal speculation and not to any factual matters that would go to the essence of the complaint.

Q. I apologize for not being rougher on you. I was admonished by Mrs. East because I was rougher on the male witnesses than I was on the female witnesses. My apologies to you if I haven't been rough enough.

*Hearing of January 15, 1970.*

*The Chair*: Would you please call your next witness?

*Mr. Valadez*: For complainant, Mabel Anderson.

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MABEL ANDERSON, having been called as a witness on behalf of the complainant, and having been duly sworn, testified as follows:

DIRECT EXAMINATION OF MABEL ANDERSON

*By Mr. Valadez*:

Q. Would you give us your name and business address, please?

A. Mabel Anderson, Cosmopolitan Placement, Investment Building, Pittsburgh.

Q. What is your occupation?

A. Director.

Q. And, in that capacity, Mrs. Anderson, do you have occasion to place want ads in the newspapers?

A. Yes.

Q. Particularly in the Pittsburgh Press?

A. Yes.

Q. Did you at some prior—strike that. How do you place your ads?

A. In conformity with the regulations of the Pittsburgh Press.

Q. And, as a result of that, were you cited by the Human Relations Commission?

A. Yes, I was.

Q. Do you—strike that. When you were cited, were you cited because of sex discrimination in placing the ads?

A. Yes.

Q. Did you subsequently have conciliation with the Human Relations Commission?

A. Yes, I did.

Q. As a result of that conciliation, what is your procedure now in placing ads?

A. I have tried to conform with the regulations. In my advertising with the Pittsburgh Press, I place the majority of my ads under male help and I cross reference it in the female, "See our ad under male help," and in each ad I place male—female.

Has that in any way increased the number of responses you have had as compared with the prior practice?

A. I haven't the statistics on those. I am sorry.

*Mr. Volk*: Not even for January 4? That's a local joke.

Q. Mrs. Anderson, when you do this, following the guidelines of the Human Relations Commission, did you find it was a little more expensive to do it the way you are now doing it?

A. Slightly.

CROSS EXAMINATION OF MRS. MABEL ANDERSON

*By Mr. Volk*:

Q. How is it more expensive?

A. In each ad I have one more line which states "male or female." It is not a sizeable amount.

Q. The complaints which were filed against you were complaints against what?

A. I was discriminating against women in my advertising.

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Q. What's different from your advertising than anyone else's advertising?

A. Nothing.

Q. Why did they pick on you?

A. I really don't know.

Q. There was no difference in the contents of your ads than Leonard, Liken Personnel?

A. No.

Q. Do you specialize in seeking employment for women?

A. Not especially. We handle business and professional types of employment.

Q. Do you have more women applicants than male?

A. In certain divisions. In the education division I have an equal number of male and female applicants.

Q. Were you ordered to change your help-wanted practices by any court or board after result of a hearing?

A. I don't know whether I was ordered. I wanted to comply, and my only solution I could think of was to include "male—female" in the ad.

Q. You never received an order? You agreed voluntarily; is that correct?

A. Yes.

Q. You said at first in placing your ads initially you were complying with the regulations of the Pittsburgh Press. What do you mean by that?

A. Well, I have been advertising for a period of maybe 30 years. It's never been any different than to put male under male and female under female. And this is what I had considered regulations of the Pittsburgh Press.

Q. Has the Pittsburgh Press told you that your current manner of advertising does not comply with their regulations?

A. There are stipulations that the Press has and we agree with them. As a matter of fact, our association, the Pennsylvania Association of Personnel Services, and Mr. Seli got together, and we must have a bona fide job before we advertise, and there are certain stipulations—maybe they are not given to us as regulations, but we comply with certain standards of advertising, of ethical practice.

Q. So the way you advertise today complies with the standards?

A. I hope so. I think so.

Q. At least the Pittsburgh Press has not complained about the way you place your advertisements?

A. No.

Q. Nothing further.

REDIRECT EXAMINATION OF MABEL ANDERSON

*By Mr. Valadez*:

Q. One further question. Now, does the placing of an ad under the male interest in your thirty years experience in the placing of advertising in the paper, does placing an ad under male indicate on the part of the employer a preference for sex.

*The Chair*: The question was asked to the opinion of the preference, which is a question based on experience in personnel work, I think, and not as of the fact of the law. So I will let the question stand and would like to hear her answer.

Did you understand the question?

No.

Q. In your experience in placing an ad, placing ads as personnel director, in your experience does the plac- of an ad under male interest in the newspaper indicate to you a preference by the employer as to sex?

A. To a great extent, yes. I would say that is true. When I put an ad under male, I presume that the preference or the place where I would get the majority of applicants for a particular type of position with certain experience or education would be preferably for a man. Not preferably necessarily, but I would draw more under the male for a particular position than I would for female.

RECROSS EXAMINATION OF MABEL ANDERSON

*By Mr. Volk*:

Q. Is it your experience that you draw more males for a particular position by putting it under male?

A. Yes.

Q. In other words, there is a reader preference?

A. Yes.

Q. I have nothing further.

*The Chair*: I have one question. Since reference was made to the complaint and conciliation, who filed the complaint against you? Do you know that?

A. It was an individual.

*The Chair*: It was an individual complaint?

A. The name slips me.

*The Chair*: It was not the Commission which filed against you?

A. So far as I know. I think it was a man who had complained to the Commission. I don't have any documents and it has been several months.

*Mr. Volk*: Was his name Gardner?

A. Yes, I think it was. Thank you.

*Mr. Volk*: Gerald H. F. Gardner?

A. Right.

*Mr. Volk*: Thank you very much.

*Mr. Esper*: Barbara Crawford.

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BARBARA CRAWFORD, having been called as a witness on behalf of the complainant, and having been duly sworn, testified as follows:

DIRECT EXAMINATION OF MRS. BARBARA CRAWFORD

*Mr. Esper*:

Will you give the Commission your name and address please?

Yes, my name is Barbara Crawford. I live at 502 Bevington Road, Forest Hills.

What is your occupation?

I am a nurse.

Are you a member of N.O.W.?

Yes, I am.

Did they request you to compile any statistics with reference to want ads in the Pittsburgh Press?

Yes.

Is this what you had compiled?

I have the original here.

You have the original there?

Yes.

Q. Would you tell us what this compilation is? Briefly explain.

A. Well, we took the December 28th want ads, and we cut every ad, agency ads and the other ads from the listings and put them under categories of accounting, data processing—

*The Chair*: Would you speak a little louder, please.

A. We took the December 28 want ads and cut them apart and put them under the proper headings for jobs in fields such as accounting, data processing, trucking and delivery, etc., to compare the jobs advertised for men and those for women.

*The Chair*: Did you intend to submit this as an exhibit?

*Mr. Esper*: Yes, I do.

*The Chair*: Do you want to go on to qualify the witness as to exhibit?

*Mr. Volk*: I am sorry.

*The Chair*: I asked was he intending to submit this as an exhibit. Then I said, go ahead and continue your questioning, then submit the exhibit.

A. Could the Commission have copies of that?

Q. Mrs. Crawford, what were your findings after you compiled this book?

A. Essentially, that the higher, better paid jobs are listed under made interest and the duller, lower paid jobs are listed under female interest.

Q. You saw some charts presented here yesterday. And would your findings substantiate what was brought up?

A. Yes, they would.

*Mr. Volk*: May I just glance through this a little bit before cross examination?

*The Chair*: Surely.

CROSS EXAMINATION OF MRS. BARBARA CRAWFORD

Q. Are you working as a nurse?

A. Yes, I am.

Q. Where, may I ask?

A. I work in a doctor's office.

Q. Did you attempt to apply for any of the positions listed on this survey?

A. No, I didn't.

Q. Do you know did anyone associated with you apply for any positions indicated in this?

A. No.

Q. So you don't now whether the companies who did the advertising would have hired a woman for any of these jobs or not?

A. Well, I really wasn't attempting to find that out. I was arranging them in order according to salary.

Q. Well, I will get a little far afield here a minute, if I may be permitted to do so. Why did you decide to become a nurse?

A. Because I wasn't encouraged to become a doctor, probably.

Q. Most of the students in your training class were girls?

A. All of them were girls.

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Q. Would you agree with the general belief that most nurses are women?

A. Yes.

Q. If you were looking for a job as a nurse, would you have any trouble finding one if it were under the female help wanted column?

A. No. May I amplify on that?

Q. No. Have you ever been denied a job because of your sex.

A. Yes, I have.

Q. What job was that?

A. This happened several years ago. I am qualified for pharmaceutical sales, and I applied for two jobs. In one instance I was told I had tested higher than the male applicants but the company wanted a man. In the second instance, I tested very well and was not offered a job. Several months later, the gentleman who gave me the test called. He had gone to a new company that was going to sell a product that was specifically feminine, and he offered me a job at that time.

Q. Did you take that job?

A. No, I didn't take that job.

Q. Did you file a complaint against any of these employers with the Human Relations Commission or any other agency?

A. There wasn't any mechanism to do that at the time.

Q. When was this?

A. It was about four years ago. We didn't have the city ordinance.

Q. How about the Equal Employment Opportunity Commission, a federal agency?

A. No, I didn't, because I wasn't aware.

Q. Were these pharmaceutical firms general or specialty houses?

A. They were — The two I did not get a job with were general firms.

Q. Did you think that they would have given you the job had the job not appeared in the male help wanted column? Do you think it would have made any difference in the mind of this manager whether it was listed under pharmacist or general interest for pharmacists?

A. I don't know. The first gentleman with whom I spoke said, occasionally women did call and he always interviewed them, because he wanted to see what type of woman would apply for a job listed in a male wanted column.

Q. Do you know the ratio of pharmaceutical salesmen by sex.

A. I know that no women ever come into our office.

Q. Aren't most pharmaceutical salesmen pharmacists by training?

A. Not now. There aren't enough pharmacists to cover the field.

Q. What is their training?

A. Anyone who actually has a B.S. degree. But anyone who has a knowledge of drugs would qualify.

*Mr. Volk*: Nothing further.

*Mr. Esper*: Does the Commission have anything of this witness?

*Mr. Volk*: May we have about a five minute recess.

*The Chair*: Do you have any further questions? Let's make it seven minutes, to 11:00.

(A recess was then had.)

*The Chair*: Will you please come to order now? My request is that both counsel and the witnesses try to speak into the microphones. I am sorry, the system is not too good at times and people in the back have some difficulty hearing. Proceed.

*Mr. Esper*: Mr. Robert Seli.

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ROBERT SELI, having been called as a witness on behalf of the complainant, and having been duly sworn, testified as follows:

DIRECT EXAMINATION OF MR. ROBERT SELI

*By Mr. Esper*:

*Mr. Volk*: Before Mr. Seli proceeds, I think the record should show he is being called as an adverse witness by the other side.

*The Chair*: Will the recorder so mark please.

*Mr. Esper*: Your Honor, this witness is called for cross examination.

Q. For the record, will you give your name and address?

A. Robert Seli, 601 Oxford Blvd., Mount Lebanon.

Q. Your occupation?

A. Classified advertising manager of the Pittsburgh Press.

Q. Can you tell us what your duties involve as advertising manager for the Pittsburgh Press?

A. I don't think we have enough time. This is my own personal opinion, but the main job is managing the employees in the classified department.

Q. In your capacity, are you familiar with the process in soliciting and selling or seeking classified advertising?

A. Yes, sir.

Q. Can you briefly describe the advertising process as it now exists? Advertising taking process?

A. Now, there are three different types of ad-taking processes in the advertising department. We have outside salesmen. We have voluntary salesmen who work in the phone room where girls take the voluntary ads that are called in. We have girls in the phone room who solicit advertising. Now these ads, if they are voluntary ads, the person who is placing the ad calls the classified department and the girl that takes the ad assists them in placing it properly and taking their name and the charge and billing it and sending it to the composing room. On the ads where they are solicited by the girls it is the same general procedure, it is the same procedure, only they are trying to solicit business. They are soliciting in reverse to being a voluntary call. The advertising with the two outside sales people that go and make personal calls on prospective advertisers, placing the ads is the same procedure. It goes through the composing room in the same manner.

Q. As far as employment opportunity ads are concerned, do your ad takers have the discretion to

place jobs in any particular column if the advertiser does not express any preference?

A. No, sir. Most of the people who call in have a preference. Let's put it this way. They know where they want the ad to run—automobile or real estate or male interest or female interest. They express this interest where they would like to have this ad placed. In what category. At times, when they do not express a preference, we ask them where they would prefer to have it placed.

Q. If the advertiser clearly expresses a preference for male or female, the Press abides by the preference expressed by the advertiser?

A. Yes, but there is a little difference here. If somebody asks to place a help wanted ad under automobile advertising, we will not accept it. It has to run under help wanted. It's a job offering. It's run under opportunities.

Q. When no preference is expressed by advertisers, you then solicit from the advertiser a response to whether he has a preference?

A. Yes, where they would prefer to have it placed.

Q. In case there is no preference expressed, even after solicitation, who then at the Pittsburgh Press decides which column it goes in?

A. I don't think we have this problem, really.

Q. In each case there is an expression of preference by the advertiser?

A. Yes.

Q. Do the ad takers guide the advertiser's phrasing of the ads?

A. This is part of their job to assist the caller to maybe eliminate some words or line to help cut the cost,

to put it in to the best advantage to the advertiser and to make it clear to the reader what they are advertising for. This is the main purpose for the girls' help.

Q. In rendering this guidance, does this not help to guide the ad into column "male" or "female," which would get the advertisers the best results.

A. Well, this is what we are interested in, the best results for the advertiser and the reader. This is our business, to get the best results for the advertiser and reader. This is the nature of the business.

Q. In an attempt to get the best results and offering the guidance and phrasing of the ad, does not the ad taker herself exhibit some guidance to the advertiser by suggesting which column would bring the best response?

A. Well, I think they are more interested in listing, starting the jobs with job titles to get them under the proper job categorization. I don't think they lead them that much. They help them in phrasing the ad, but not determining which class they are to run in.

Q. Can you tell me how many employees you have as ad takers and the breakdown as to how many are female or male?

A. Ad takers, 40, daylight. This would be normal hours, 7:30 to 9:00 through 6:00, and these are female. We have nine male ad takers who work at night. This is from 6:00 till 10:00 or 10:30. We have also the outside sales. We have thirteen outside salesmen.

Q. In the process of ad taking (the procedure and the system) who is responsible for laying down the

rules as to procedure in ad taking, answering the phone, and so forth?

A. This would be my responsibility, in the end, I would say.

Q. Does the system, as it exists, suggest to the ad takers that they inform the advertiser an expression of preference without a bona fide occupational qualification may be violation of the Pittsburgh ordinance?

A. Would you repeat that? I didn't get the question.

Q. In accepting ads, whether they come in voluntarily or are solicited before the actual make-up or during the actual make-up of the ad at any point, does the ad taker inform the advertiser that an expression of preference without a bona fide occupational qualification in accordance with the fair employment ordinance may violate the law?

A. No.

Q. Do you ever receive ads through the mail that do not specify a preference? Assuming that were the case, what would the reaction of the ad taker be?

A. If there is time, we telephone. We receive quite a bit of advertising through the mail. Most of it comes from advertising agencies throughout the country, California, and throughout the world, in fact. These people specify what classification they want their ads run under. There are times we receive ads—I do not remember any that specifically did not suggest, state the classification they want it under.

Q. You don't recall receiving a written order for an ad that did not specify male or female?

A. No. I can't say that I do, because I don't receive the letters myself. They come to a clerk who processes them.

Q. If such a request was received, is there something in your present guidelines that would permit the ad taker to act one way or the other as to where the ad is placed?

A. If there is a question about where the ad is to be placed, we will not place it until we find out where they want it, either a phone call or letter. If it's a call and it warrants the expenditure, we will call California.

Q. Your answer is, as I interpret it, that the Press never runs an ad without the advertiser first expressing a preference? And, in the absence of an indication of preference, you don't run the ad?

A. I can't say we never do, because we have so many employees, almost a hundred employees in our department. And I can't say that it would not accidentally happen. But our policy is not to.

Q. Your policy, then, as I interpret your answer, is to act in accordance with the expressed preference of the advertiser?

A. Right.

Q. As to which column it would appear under, that is, male interest, female interest, male-female, situation wanted—male, situation wanted—female?

A. Yes. However, I don't think that "situation — male or female" applies at all in help wanted.

Q. You don't have a situation wanted without the designation "male" or "female"?

A. Yes, we do, "situation wanted—male," "situation wanted—female."

Q. You don't have a column that states situations wanted and nothing else?

A. No.

Q. You don't have a request or any need for any such a heading that says "situation wanted"?

A. No, because these are individual people that are looking for jobs. I don't think it's necessary, really. A man or woman applying for a job knows if he is a man or woman, I would think.

Q. Are you aware of the anti-discrimination portion of the Pittsburgh ordinance as it relates to employment?

A. I am familiar with it.

Q. Are you doing anything to enforce these laws or taking any action to educate your advertisers as to the law?

A. We were asked by the Human Relations Commission to do several things, which we have tried to do. And I think we have been quite successful.

Q. If I were to send an ad by mail, that is a letter ad, to the Press saying "social worker, M.S.W. degree, available immediately, call 777 or whatever telephone number, and enclosed the proper fee for running the ad, how would your ad taker handle it?

A. This is under situation wanted, And you signed your name?

Q. S. Valadez.

A. We will check to see.

*Mr. Volk*: We are going to object to this line of questioning. It is the help wanted ads under complaint, not the situations wanted ads. I don't think any line of inquiry as to the situations wanted is relevant to the scope of the complaint, taking

the complaint even the way the complainant wants to take it. Not only that, the law doesn't address itself to people expressing a preference; it addresses itself to employers. The only persons who can discriminate under employment is an employer, not an individual.

*The Chair*: We will note your objection, but we will deny it, sir.

Please proceed.

Q. Do you want me to repeat the question?

A. Yes. Was there a question?

Q. I think it was, to the best of my memory, if I were to send you by letter an advertisement to place in the situations wanted and enclosing proper fee saying, social worker, M.S.W. degree, available immediately, call, and give telephone, and sign my first initial.

A. We would call you, if we could get a hold of you, or write you a letter and find out where you would prefer to have it.

Q. And, in the event you were unable to reach me, what would your action be?

A. At times, we might put it under one or the other, depending how significant. I think I know what you're driving at. Maybe I can save a lot of time for you. You are talking about a particular situation wanted ad for a chemist, placed by DuWayne and Jean Witter. And we placed it under situations wanted—male. Correct? After that, we got a letter from DuWayne and Jean Witter that we placed this ad under the wrong classification. We understood that DuWayne was placing the ad, not Jean, and I

think this would be normal assumption. However, it doesn't apply to the help wanted at all.

Q. Well, you are talking about employment opportunity and sex segregation and the alternatives that the public has in utilizing the facilities of the Pittsburgh Press. The facilities are limited by the Pittsburgh Press and allow the public to use the facilities of the Pittsburgh Press. It's indicated that the letters came to you as you stated, signed by both DuWayne and Jean Witter; is that your testimony?

A. I don't think it was signed by anybody. There was a tag at the top of one of those address labels. I don't think it was signed.

Q. The point I am trying to get is, how would it be classified if it were?

A. It was a trap, a plant. It was done at the exact same time the hearings started in October, or November. I forget which. The letter did not come to me but through our regular system, through a clerk that places these ads. There was no question in his mind that it was DuWayne Witter.

Q. There was no question in his mind?

A. That it came from DuWayne Witter?

Q. You received the name DuWayne Witter, or it wasn't signed?

A. It wasn't signed.

Q. The return address on the envelope was DuWayne and Jean Witter and it's your answer it was a natural assumption it was received from DuWayne Witter?

A. That would be my assumption.

Q. And this assumption is based on what guideline that it comes from DuWayne Witter?

A. Because that was the first person's name on the return address.

Q. And if the address read, Jean and DuWayne Witter? Would the natural assumption be it came from Jean Witter?

A. That would be natural.

Q. And he would have run it under situations wanted —female? You have a guideline that says it should be run on the first name if received with no signature?

A. We have no guideline. We just think it's common sense.

*The Chair*: May I ask one question? This ad was for what position?

A. If it was the same ad the attorney is talking about, it was for a chemist.

Q. From your position with the Pittsburgh Press, are you in a position to tell me what is the revenue to the newspaper from advertisers, as opposed to, say, circulation, not the dollar figure, just the percentages to compare classified advertising revenue to other advertising revenue?

*The Chair*: Excuse me. Please, would you repeat the question. The reporter has difficulty hearing you, sir.

*Mr. Esper*: We withdraw the question. No further questions of this witness.

*Mr. Volk*: We are not going to cross examine this witness because he will in all probability form the corner stone of our own defense, and we would rather put in our own defense in our own way rather than attempt to do so by countering the tes-

timony that was brought out by complainant at this time.

*Rev. Johnson*: I wanted to ask the question. Did I understand you to say that the Press does advise people who call in, or does not advise people who call in, whether or not they are in violation of the ordinance the way they place the ad?

A. No, the question, I think, Reverend, was, do we tell them? The question was different from your question.

*Rev. Johnson*: Let me ask it that way then. Maybe the questioning here is a little confused. I was wondering whether or not you did advise a person when they called in whether or not when they made the request whether it was to go into "male" or "female;" that it was in violation of the ordinance. It pertained to some line of questioning here.

A. We don't tell them where to place the ad and don't advise them where to place it.

*Mrs. Reizenstein*: How long have you held this position with the Press.

A. This immediate position as classified manager?

*Mrs. Reizenstein*: Yes.

A. Three and a half years.

*Mrs. Reizenstein*: During that three and a half years, have people asked for a preference due to race, religion, national origin?

A. No.

*Mrs. Reizenstein*: Never in the three and a half years?

A. No.

*Mrs. Reizenstein*: Do you ever recall either City or State Commission advising you as to having put in an ad that might have slipped in inadvertently?

A. Yes.

*Mrs. Reizenstein*: What do you do then?

A. Then we take it out. If it has gone in inadvertently, as you say, Mrs. Reizenstein, and we do attempt to watch this—sometimes it does go in, but to the best of our ability we try to keep it out.

*Mrs. Reizenstein*: But you see a difference now as regards the law as to sex and anti-discriminatory parts of the act relating to race, color, national origin, and religion?

A. Back in September, I think it was, Mrs. Reizenstein, we met with the Commission and they asked us to take the "man" and "woman" out of the individual ads; that they felt this was the proper way to do it. And we agreed to do it.

*Mrs. Reidenstein*: Would it be simpler, do you think, in performing your duties, if it were all simply filed and put in without the headings "male" and "female"? As I gather from what you are saying, it is.

A. Yes, it would be simpler, but it is not in the best interests of the reader or advertiser. These are

the people we are appealing to— the advertisers and readers. These are the people we have to take care of.

*Rev. Johnson*: Did you say that if they did not specify whether it was to go under the male or female column, that you asked them?

A. Yes.

*By the City Solicitor*: I gather from the testimony here that if an employment agency sent in an ad and specified "male interest" you do not advise the agency as to the ordinance involved here? You just take the ad and insert it in that portion?

A. Yes, sir.

Q. And at no time then does the Press make any judgment as to whether a particular ad does or does not violate the ordinance?

A. No, on that particular—On placing and positioning the ads, no.

Q. Do you make any judgment as to the content of the ad?

A. Yes, we may tell them about the Human Relations Commission's request that "man" and "woman" not be placed in the individual ads, and they conform to this at our request.

Q. Only to that extent, to make a judgment?

A. Yes, sir.

*The Chair*: Thank you very much.

*Mr. Esper*: Elizabeth Koontz.

MRS. ELIZABETH KOONTZ, having been called as a witness on behalf of the complainant, and having been duly sworn, testified as follows:

DIRECT EXAMINATION OF MRS. ELIZABETH KOONTZ

*By Mr. Esper:*

Q. For the record, will you give us your name and address?

A. My name is Elizabeth Koontz. I live at 1830 16th Street, NW, Washington, D. C. At the time my voting residence is still 418 South Caldwell Street, Salisbury, North Carolina.

Q. What is your profession, Mrs. Koontz?

A. By profession, I am a teacher. At the present time, a government employee.

Q. In your profession as a teacher, were you affiliated with any professional groups involving the educational field?

A. Yes, I belong to the local association in North Carolina, the National Educational Association, as well as the Council for Exceptional Children.

Q. Have you held any other positions with the National Educational Association?

A. Yes, I was president in 1965-66 of the largest division, the division of classroom teachers, and until February 1969 I was president of the National Educational Association.

Q. National president?

A. Yes.

Q. Your present employment is with the government?

A. Yes, as Director of the Women's Bureau of the Department of Labor.

*Hearing of January 15, 1970.*

*The Chair*: Excuse me, Director of what bureau?

A. Of the Women's Bureau of the Department of Labor.

Q. What is the function of the Women's Bureau of the United States Department of Labor?

A. By the enabling act, a Congressional action, the Women's Bureau was established to promote opportunities for women in employment, returning women to work for voluntary organizations, to promote improved status for women, and to recommend policies concerning their employment.

Q. In the evolving of policy recommendations, have you had opportunities to consider statistics and other data that appear on questions of women, sex, and sex discrimination in employment?

A. Yes, very much so. And as an agency we are the bureau within the federal government that passes on the Equal Employment Opportunity Commission, the Office of Federal Contract Compliance, and any other agency of government concerned with employment, the fact that there seems to be discriminations against women. But we also take facts, data and documentation from the Bureau of Labor Statistics and try to interpret that data in the light of what seems to be prevalent across the country.

*Mr. Volk*: Before we go on—I know it will be futile, but I am going to renew my objection for the record, to the relevancy of this broad-based ethnological, sociological discussion that we were treated to yesterday. I feel this line of questioning

is addressing itself in the same direction. So I would like the record to note my objection to it.

*The Chair*: The objection will be denied and noted for the record.

Q. Mrs. Koontz, will you comment on the findings and recommendations that have arisen out of these studies as far as they pertain to, that is, from the Women's Bureau, insofar as it may relate to the matter of sex discrimination, and if you have any specific findings insofar as classified advertisements. And also further comment, I will just pass the question all at once, if in your opinion, any of your findings sustain the comment that it is valid to compare discriminatory racial preferences in the different job interest classifications and classification between men and women?

A. I should say before I came to the Bureau as a Director there had been a great deal of activity and investigation into this matter. Since I have been with the Bureau, we serve with EEOC, the Equal Employment Opportunity Commission, on this very matter. It was the determination that this was discriminatory, the same way racial deliniation was, and EEOC issued guidelines that this be observed. And that in the face of jobs and the descriptions now for jobs, the influence of technology on jobs, there was no longer any need for this kind of deliniation. From further study, however, that this kind of discrimination is following the same pattern as that which was our main course in racial discrimination, from the standpoint that as long as "colored" remained in the ad, it could be argued

that one had the right to apply. But there was a kind of inherent, builtin understanding of those involved in the process that said, or was understood without being said, that colored would not be considered. This was removed after a great deal of litigation. It would appear the same occurs in the matter of sex. We have cases of discrimination referred to the Women's Bureau and, on the face of it, that the onus is on the individual to make the complaint and pursue it through court, there seems to be a rather understood kind of thing implied by the very deliniation. It is our feeling in the Women's Bureau that categories of jobs would better suit and would better serve the public and would remove this discrimination. There are some instances. I cannot state them specifically. I know of a newspaper that believed there would be a decrease in its advertising if it were done in a single line fashion. And, in this instance, it was proved that there was an addition of eight inches of lineage, as a result of the change. Basically, I think it is a case of what it does to the individual. As in the case of racial discrimination it presupposes one does not have the intelligence and that one does not have the interest. But that is being determined by someone other than the individual who would make that choice. And we see this as one of the most detrimental factors in the matter inasmuch as one can be conditioned to know that he need not apply. So to avoid the embarrassment and to avoid, I think, the degradation that goes with it, there is a limitation to what one does apply for. So that if it does no danger, as we see it, to the job and there is no such feature, no re-

quirement, really, that one could say was different, then it would seem to be discriminatory. And EEOC has determined this. OFCC is now setting its guidelines in line with this kind of thing.

Q. Are you affiliated in any manner with the United Nations or a United States Commission or any agency that is affiliated with the United Nations?

A. Yes, I do serve as United States delegate to the U. N. Commission on the Status of Women.

Q. How does the concern of the Commission on the Status of Women—

*Mr. Volk*: I am really going to object. We came here initially to discuss an alleged violation of an ordinance of the City of Pittsburgh. Testimony was given as to the state of Pennsylvania, and we have been treated to a long treatise, in fact the bulk of testimony, pagewise, pertains to the policies of the government of the United States of America. Now we have to listen to the world, yet. I suggest if we can't keep ourselves to Pittsburgh, we at least keep ourselves to our own nation.

*The Chair*: I will call a two minute recess. I would like to consult with both counsel.

(A two minute recess was then had.)

*The Chair*: Mr. Counsel. Excuse me. You better withdraw the previous question.

*Mr. Esper*: I withdraw the previous question.

Q. Mrs. Koontz, do you have any evidence of any relationship between these practices of sex segregated newspaper advertising and the training of girls or women in secondary schools?

*Hearing of January 15, 1970.*

A. Yes, I do. As a teacher in the secondary schools, when there were programs for training offered, there were limitations placed on the number of girls who would be involved simply because of the lack of availability of future employment, and it was declared, in a sense, on the matter of the attitude of employers toward the employment of women and girls, so that it affected the training programs and availability, and, in effect, served as a quota system for their involvement in certain kinds of programs available with public funds. I think this in itself bears out what I was trying to say, in that it is inherent in a kind of declared system that's not always verbalized but is rather implied or understood which has the same effect as being verbalized.

*Mr. Esper*: Cross examination.

CROSS EXAMINATION OF MRS. ELIZABETH KOONTZ

*By Mr. Volk*:

Q. You mentioned the EEOC guidelines. You are aware of the off-again, on-again status of the EEOC vis-a-vis segregated want ads, male and female?

A. I am not aware of the on-again, off-again, but I am more aware of the change in the action on the situation in employment that exists and increased population of women that have made them take a further look in the face of evidence.

Q. You are aware that at one time, for a considerable period of time, the EEOC said in its guidelines that the brief way, an explanatory box such as the Pittsburgh Press has, was preferable?

A. At one time, I think, we have had positions on a lot of things that have changed on the face of evidence.

Q. Was it evidence or political importuning of Women's organizations?

A. I am sure it was evidence that the records would show from the hearings of the OFCC, from which the EEOC gained its insight.

Q. The records of the OFCC? The OFCC held hearings?

A. Yes, in August of this past year.

Q. I believe the EEOC guidelines were changed before that.

A. They were not changed until December 1st of 1969. The EEOC guidelines were issued following that.

Q. Of what year?

A. This past year.

Q. That's simply untrue. The EEOC guidelines, prohibiting sex classification by sex—

A. BFOQ, with that inclusion. The December 1st guidelines. I thought this was what you asked.

Q. Mr. Stickle believes they were in December of 1968.

A. This is 1970 and I was not there in 1968. This has been a very recent development in the EEOC.

Q. I have been familiar with these guidelines for over two years that I personally know of.

A. I am sorry that I do not have a copy of the document to give you.

Q. They may have reissued the guidelines but EEOC's methods of proceedings are weird and wonderful at best. But I do know the guidelines have been in effect for several years.

A. I think you would agree, however, that it has been under these circumstances as groups of citizens have been concerned about issues that have brought about changes in guidelines, which I think is a re-

sponsibility of government, which is to respond to the needs of the people.

Q. In fact, the law hasn't changed at all, has it? The Civil Rights Act of '64 is still the law. It has not been altered in this regard. Title VII is the same as it was in 1964, is it not?

A. I think the fact that we have eliminated a great deal of racial discrimination as a result of its interpretation is an indication also of the need for change in the interpretation of sex as well.

Q. The guidelines interpret the law, and the law itself is the same; that's a fact, is it not? If you will limit your answers to my questions I will appreciate it a lot.

A. I think you have answered the question by saying that the interpretations do change.

Q. But the law itself does not change.

A. No, and the law does prohibit discrimination by sex.

Q. Do you know whether the EEOC guidelines are directed at newspapers or employers?

A. I think as the evidence of the hearings indicated, there is weight on both. However, the evidence of the hearings—

Q. What hearings?

A. The hearings of August 1 through 4, I believe.

Q. That was the OFCC, was it not?

A. Yes, and from that was this evidence that was presented.

Q. That has nothing to do with the Equal Employment Opportunity Commission, does it? The OFCC is the part of the executive department of the government dealing with federal contract compliance appointed by the President. The EEOC is a commission oper-

ating under the Civil Rights Act of 1964. It is not the same thing at all.

A. It was your reference to EEOC and the change of attitude about it that brought it into the discussion.

Q. I asked you about the EEOC guidelines.

A. Yes, it was your reference to it that brought it in. You referred to its wavering, if I understood your question—

Q. That was my first question. I have asked several questions since and you continue to answer the first one. Do you recall that the EEOC guidelines as they exist, not the OFCC nor the Women's Bureau nor N.O.W., but the EEOC guidelines address themselves to discrimination by employers and do not address themselves to newspapers? If you do not know the answer, please say you do not know.

A. I am afraid we are not talking about the same thing. You did not seem, sir, to be aware of the issuance of any guidelines after the period that you spoke. And since I do not have a copy here with me, I cannot present them as evidence of what those guidelines said.

Q. I am examining you, ma'am. You are not examining me. If you don't know the answer to my questions, I would appreciate it if you would simply say so.

A. The guidelines were changed in their interpretation by the EEOC.

Q. That wasn't my question. My question was, do the guidelines as they exist or as they once in the future existed, address themselves to newspapers?

A. Yes, they do to the help wanted ads.

Q. Do you know what it says?

A. I cannot quote, and I do not have it here, so I would

prefer not. I might add, sir, that it does, it does deliniate an interpretation of the of the BFOQ which was in effect before, and it does remove that kind of qualification.

Q. You mean there is no longer BFOQ?

A. It has been debated out. As you say, EEOC does not have enforcement power, but it does give further deliniation of that qualification.

Q. I want to make one thing very clear, that you are contending to us that the Equal Employment Opportunity Commission issued a guideline on newspaper advertising or including newspaper advertising last month, December, 1969?

A. Yes, following the August hearings of the Office of Federal Contract Compliance, held in August, and I believe the dates were 1 through 4.

Q. Who held the hearings? What was the panel comprised of? Who was on it?

A. The Office of Federal Contract Compliance held the hearings. Present on it was the Commissioner of the EEOC, Mrs. Olivarez, Mr. Robert Moran, who is head of the Wage and Hour Division, and Elizabeth Koontz.

*Rev. Johnson*: What was the last name, please?

A. Elizabeth Koontz.

Q. And how was this commission convened? For what purpose? Who directed it to be held?

A. The OFCC.

Q. I have nothing further.

*Mr. Esper*: No further questions of this witness. Thank you, Mrs. Koontz.

*The Chair*: Thank you very much. The witness is excused.

*Mr. Esper*: At this time, the complainant rests its case, subject to the future for rebuttal, and we reoffer the exhibits introduced yesterday as evidence.

*The Chair*: I think yesterday there were exhibits offered as big charts and they were passed to Mr. Volk. And this will be Complainant's exhibit 4, which are reproductions of the charts shown.

It is ten after twelve. Do you care to make your statement now? I think we will save time.

*Mr. Volk*: Yes. My statement is going to be very brief because our prior arguments and the brief of the amicus addressing itself to our preliminary objections has already been made and I do not wish to burden the Commission with redundancy. I think the Commission has been burdened enough with irrelevancy and I don't want to burden it with redundancy.

We have failed to see how even in the most flagrant procedural abuse, if we concede that flagrant abuse occurred (I am sure nobody does) and the complainant was permitted to make his complaint through evidence rather than through the defective and totally incomplete document which constituted the complaint. There still was no adequate violation of the ordinance of the City of Pittsburgh proven in the following two days of testimony. As a matter of fact, after listening to the witnesses, particularly, I might add, the last one, I don't have the slightest idea what they are talk-

ing about, let alone how that constitutes a violation of the ordinance of the City of Pittsburgh. And I contend that what has been demonstrated is exactly what we have talked about in one of our preliminary objections, and that is that our sin appears to be a failure to recognize and comply with the sociological concepts of the National Organization for Women. That is not yet a crime, as I pointed out previously. The proofs, if one may dignify them by that title, which were adduced here in the last two days, proved nothing other than some women feel that help wanted advertisements broken down into any form of "male" and "female" categorization constitutes an evil which should be remedied. They may be right. I personally don't believe they are. But if they are right, that is a matter for the legislative bodies, not for the Human Relations Commission of Pittsburgh, whose duties are to interpret and enforce an ordinance of the City of Pittsburgh which prohibits discrimination in employment. We don't believe that they have made any case that shows that the Pittsburgh Press has discriminated in employment, and we don't believe they have made any argument that the Pittsburgh Press has aided and abetted anyone else in violating the ordinance of the City of Pittsburgh. I suggest they seek to have this law passed through the proper channels, which would be an an appeal to the City Council of the city of Pittsburgh or to the state of Pennsylvania, the State Legislature of the state of Pennsylvania, to have a law passed prohibiting the segregation of want ads in any manner and deliniating for the edifica-

tion of the newspapers exactly how they can legally present them.

I do not believe the proofs here, should they even have been able to prove such a violation on the part of the Pittsburgh Press, were directed toward such proofs. This was a showcase trial, conducted apparently to obtain publicity for the National Organization for Women and their aims. It did not address itself to the violation of law. It did not address itself to the ordinance of the city of Pittsburgh. It addressed itself to just what we feared yesterday, a rather disappointing mishmash of psychology, pseudo-psychology, sociology, pseudo-sociology, and the mores of New Guinea natives. It did not address itself to the ordinance of the city of Pittsburgh. And we contend that, since no violation was introduced before this body, that the complaint against the Pittsburgh Press should be dismissed forthwith.

*The Chair:* We have ruled on your motion before and we denied it. Now do you intend to present any witnesses, any rebuttal?

*Mr. Volk:* Yes, of course. We have, however, procedurally a double motion. We originally asked that the trial be dismissed preliminarily, and that was denied. Now we renew, of course, that objection, that motion. But, in addition, we also state that the Commission, or that the complainant have not proved a pima facie case and we then rule that even having been permitted to put on their case, agreeing with everything they said, they didn't prove a violation of the ordinance, and the ordinance, after testimony, should be dismissed. There

is really a double motion there, we are not merely renewing our first motion. However, should you overrule our current motion, our second motion, then we would request adequate time to prepare a defense to the testimony which was introduced and to present that defense at a later date.

*The Chair*: Based on my knowledge of procedure, the first part of your motion was in the nature of a demurrer, right?

*Mr. Volk*: Yes. It is typical at a trial at the conclusion of complainant's case, if you don't think they made one, you make such a motion.

*The Chair*: As to the first part of the motion, we deny your motion. As to the second part, we are willing to grant you an adequate amount of time, say two weeks or so, for preparation of the defense. And, at a time convenient to both parties, we will reschedule that portion of the hearings.

At the suggestion of the City Solicitor, we would request both parties to present, hopefully, by that two-and-a-half week period or so, a brief memorandum of law on the fact of the city ordinance, the law of the Commonwealth of Pennsylvania, and the law of the United States, insofar as applicable.

Before I recess this hearing, a number of amicus curiae asked to submit briefs and make oral arguments. Consequently, after this meeting will be reconvened, which will be about 1:30 or so, such amicus curiae as want to make a brief oral statement and submit their briefs may do so with the understanding that if after the completion of the

case of the respondent and the rebuttal, if any, by the complainant, if the amicus care to make additional oral statements or submit additional briefs, they may do so.

*Mr. Venable*: I think I speak for the amicus curiae who are siding with the Pittsburgh Chapter of the National Organization for Women in stating that we do not wish to present our amicus briefs now but will wait until the end of respondent's case.

*The Chair*: How about you, sir.

*Mr. Stickle*: Mr. Chairman, just after the hearing adjourned, we submitted a brief. I would like the records to reflect it has been filed, if that is possible. We submitted an original and two copies. I believe I circulated copies to all the other interested parties. If they have not received one, I have copies on the desk here. I would be happy to argue at any point the Commission would desire.

*The Chair*: What would be a convenient point for you to argue, may I ask?

*Mr. Stickle*: It would be convenient for me to argue after we return from lunch or after the respondent has put in his case. If the Commission would prefer, I would perhaps prefer to argue at both times.

*The Chair*: In that case, the hearing will extend recess until about, say, 1:40, which would give enough time for people who want to have lunch to come back. Would that create any transportation problems, Mr. Stickle?

*Hearing of January 15, 1970.*

***Mr. Stickle***: Would you indulge me for one moment please?

***The Chair***: Sure. Would you prefer an earlier time?

***Mr. Stickle***: Mr. Chairman, let me withdraw that offer for argument. Since I would appreciate to argue at the end of the case, perhaps that would be best.

***The Chair***: In that case, this hearing extends adjournment for about two and a half weeks, for the date to be announced to all parties, convenient to the counsel for both complainant and respondent.

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## Hearing of February 12, 1970

THE NATIONAL ORGANIZATION FOR WOMEN

VERSUS

THE PITTSBURGH PRESS

THURSDAY, FEBRUARY 12, 1970

*The Chair*: Mr. Volk, it's your turn.

*Mr. Volk*: Thank you, sir. We find that our defense will be relatively brief, and limited. At least I trust it will be, although one can't tell about these things until you begin. I assume that a brief opening statement is called for. I don't intend to make a formal argument by way of opening statement. A lot of arguments have been made so far. I said at the last hearing I don't want to compound irrelevance with redundancy. Today, our defense will consist exclusively of two witnesses, the first of whom will be Robert Seli who you have heard before, when he was called by your opponents. Bob is the advertising manager of the Pittsburgh Press, and he'll give us some facts on the Press advertising policies handling it, and advertiser-reader preferences and interests as he knows them to be. And then we have a psychologist with us who, I trust, will clear the air on some of the testimony we were privileged to hear at the last hearing concerning the differences between men and women and the lack of them. And essentially what we all know, but apparently have to reprove to ourselves, that women and men do have substantially different interests in occupation and in employment patterns, and these interests are legitimate ones, and that they may prop-

erly be appealed to by employment agencies and by newspapers in classifying their advertising by jobs of male interest and jobs of female interest. And with that I think we will rest our defense, relying, supplementarily, on the arguments that we made at the previous hearing and arguments which I trust we will be permitted to make in a post-hearing brief on the technical or legal objections which we previously raised to this whole proceeding, and secondly to proofs introduced by the complainants, and thirdly to our right to continue to do what it is we are doing, over the objections of whatever dissident group cares to challenge. In essence, that it is not improper under any laws to classify our advertising in the way we are now classifying it. So, with that, I think I would like to call Mr. Seli to the Stand, if I may?

DIRECT EXAMINATION OF ROBERT SELI

*By Mr. Volk*:

Q. Would you state your full name and your job, Bob?

A. Robert Seli, Classified Advertising Manager of the Pittsburgh Press.

Q. What is your job background?

A. I worked for the newspaper for—I'm in my twenty-ninth year now. I started in classified advertising in 1941, and I was a salesman when I left there in 1951—I went to retail advertising. I remained in retail advertising as a salesman for fifteen years, 'till I came to the job of classified manager in 1966, in July.

Q. And that is your current position? What are your job duties as classified ad manager?

A. It is supervising the advertising that is handled by the classified department, which includes all the classified advertising, from death notices up to and including automobiles, real estate, garden advertising, legal advertising — all legal advertising in the newspaper is handled by the classified department. And its supervising employees, and trying to get more business.

Q. And as such you deal with advertisers, employment agencies, and so on. I requested that you have some statistics on your help wanted ads, from the Pittsburgh Press?

A. Yes.

Q. Why don't we discuss them for a minute—the number of ads annually, where they come from, and so on. How many ads or lines of ads do you have a year?

A. Well, this last year, 1969, we ran 248,000 help wanted ads, individual ads. This is daily and Sunday.

Q. What percentage of your ads comes from employment agencies?

A. Well, the total of help wanted lineage is about three million a year, and approximately twenty-five percent comes from employment agencies.

Q. What are the meanings of the the words "general" and "local" that you use?

A. Well, we have local advertising rates and general advertising rates. General advertising rates apply to those advertisers that are outside the fifteen mile radius of the City of Pittsburgh. Every newspaper uses this system and some of them have

different boundaries of where they start the general rates.

Q. Could you give us a breakdown of your advertising as to local and general?

A. The, as I said before, twenty-five percent of the help wanted comes from the employment agencies, at least twenty-percent comes from outside the fifteen-mile area of the City of Pittsburgh and all across the United States included in there. Thirty-five percent of the classified help wanted advertising comes from outside the City limits but inside the fifteen-mile area.

Q. Making a total of how much comes from within the City limits, in your opinion?

A. I would say twenty percent of the advertising comes out of the city, plus the employment agencies, which is twenty-five percent. But the problem with employment agencies, they're not looking for jobs for people within the city entirely, so this is where the advertising originates but this isn't where the job offer comes from.

Q. So that forty-five percent—this may involve advertisers from within the city at least a substantial proportion of that involves jobs that are not within the city.

A. Right.

Q. You are unable to tell us exactly?

A. No, because I don't know where the job opportunities are coming from.

Q. Can you give us your best estimate of what percentage of your wanted ads or lineage, whichever, comes from employers of less than five people?

A. Well this would have to be an educated guess. We'll have to talk of it in terms of ads instead of lineage because naturally smaller employers do not use large lineage.

Q. You don't have the exact statistics?

A. I don't, but it would be about, I'd say, fifteen to twenty percent.

Q. Of your total advertising?

A. Of our total classified advertising, by people with less than five employees.

Q. Now tell us how your ads are placed — there was some confusion about that at the last hearing. I don't know how relevant it is, but as it was confusing let's touch on it again. What percentage of your ads are received by telephone, Only help wanted ads.

A. I would say about sixty percent of our — maybe seventy, seventy percent of our lineage would be received by phone. The balance would be by mail, or solicited—we have two salesmen downtown that call on employment agencies.

Q. Who generally selects the classification under which the ad is classed male or female? How is this done?

A. We have to, more or less, ask the advertiser to select this, because we get in a bind if we don't. If we place an ad where we feel it should go the advertiser will call us and say, well, I didn't want the ad there. So we actually ask the advertiser where would you like to have the ad put. So they make the decision really, so we are not liable. We do not have to pay for the ad.

Q. There are exceptions to this?

A. Oh yes, there are going to be some mistakes, and we make enough of them.

Q. What policing do you do of your ads?

A. There are many different types of policing, but one of the main things we have to do is watch, in particular, in sales ads. We have a regulation of our own—this is not a federal regulation, or state regulation — we insist that the advertiser state what type of sales job its going to be and what the basis of remuneration is. The reason we do this is so people don't have to run hither and yon to find the job they want or go to the job and find its not the sort of sales job they had in mind, or its a misleading ad. The main job is to try and keep the ad truthful and stay away from being misleading. This is where our readers come into it. We get many complaints when ads are illegal—they're illegal if they're not truthful.

Q. May I ask that I inject a question. How many complaints to your knowledge have you received over the year from segregating your ads by sex?

A. We have no records of receiving any up until this hearing started. At the end of October I think we had a hearing. At that time we received nineteen or twenty complaints. They were all connected with the NOW hearings at that time. Some of them were duplicates too.

Q. Some of them were familiar names?

A. Yes, familiar names.

Q. Names connected with NOW?

A. Yes, a husband and wife and . . .

Q. Until then, you received no complaints?

A. Nothing.

Q. Even though you get complaints about other aspects?

A. Yes.

Q. What policing do you do of employment agencies? How are they policed when they put in their ads?

A. Well, employment agencies are regulated by the State, are licensed by the State. So we try not to police them or get into the policing business. This isn't our job. But the State has asked us to watch these things; you know, do some things for them, on which we cooperated with them. But the main job that the state does is trying to make sure that the employment agencies have an actual bona fide job offer. This is the main reason. When we get a complaint from a reader that says, look, I replied to this particular ad and they didn't have this job. So we call the State immediately and report this and they investigate. The licensing agency checks to see that the employment agency has a legitimate job offer. When it comes to policing, we try to work, we carefully work with the Human Relations Commission here in Pittsburgh. We've worked—

Q. That's another subject I want to get into a little later. I'll go into that in some detail, as to your dealings with the Human Relations Commission. Our argument has been, that placing ads the way we do is a convenience primarily to our readers and to our advertisers. Would you care to comment on that? The inconvenience of lumping the ads to the newspaper, would it be an inconvenience to the newspaper to lump their ads in a single unit?

A. This would be the easiest way for us to place advertising — would be to lump them all as one unit. In

fact, I think you will notice that many weekly newspapers, they do this — they lump all their ads together. Automobiles, miscellaneous, or anything. It would be much simpler in the help-wanted to just have one classification; but it's not convenient, it's not for the benefit of the reader, it's not for the benefit of the advertiser. It would save money, really, I feel, if we lumped it all together.

Q. What inconvenience would it be to the reader? Based on your knowledge as an expert in this field. I realize this is speculative testimony, but speculate a bit.

A. I think in many instances it's a hardship. I'm not talking about a person that has a particular job and he wants to better himself, wants to get a better job. He's working. But the way I feel is for the person who is out of a job, who is looking for employment, and needs employment — when we do not classify the ads by job interest, by sex interest, really, of what the job is going to appeal to, who the job should appeal to — that we can have a, say, a man or a woman travel the way across the city to apply for a job and that she finds that this job is not what she wanted, its not in the proper atmosphere that she'd like to have. Whereas if you say its of more interest to a man or a woman, then in particular fields I'm going to have a good chance of being hired for this job. But why get me out there, and I'm not even interested in the place. This is a hardship — its carfare, its busfare, its time, its waste.

Q. How about the advertisers? They seem to like it. Do you know why is that?

A. It's the way they get results.

Q. Tell us about that.

A. In classified advertising the main thing is reader interest and reader response. We appeal to the readers. If the reader reads our ads or if he follows them then the advertiser will get results. If we don't create it so the reader can easily disseminate from the different ads and read them and, you know, go through them by categories — like automobiles and miscellaneous, and help wanted male and female and so forth — if you don't have this they will lose reader interest; it will lose results; the results will be poorer for the advertiser and in that way we lose money.

Q. Give me an estimate as to the response ratio to the male-female column, the one where they're all lumped together.

A. Just from comments from different people they don't get results; they don't get as many answers to an ad under male-female as they do under male interest or female interest separately. They do not get it that way.

Q. Have you had any advertiser objections to your neuter ad bodies that you have been working on? Salesperson instead of salesman, or as I saw in an excerpt from a magazine somebody sent me, cowperson instead of cowboy — to show the baroque extent to which some of this has gone — when you have used these neuter ad bodies have you had any advertiser reaction?

A. Very, very much. It's mostly — we have it in the city. It takes us a while to do this; they're not aware of how we are trying to cooperate with the Commission in taking sex out of the particular ads. We have changed like "salesman" to say strictly

"sales" now. The biggest problem though is the out-of-town advertiser. They can't see why they have to do this when they are not under the law or under our regulations or under our Commission. Why do I have to say "sales" rather than "salesman"? We've lost advertising. I know of a couple of instances where I've talked to the particular men because they've talked to our clerks or salespeople and they've said I'd like to talk to the manager because this is ridiculous and I've said we can't accept it this way — anyway other than sales — and they said, forget the ad.

Q. As a matter of fact you can insist on the policy you worked out with the Human Relations Commission as a matter of accommodation. Now is an appropriate time to talk about our efforts to do so. Tell us about the Pittsburgh Press's efforts to work with Mr. Washington and the Human Relations Commission of the City of Pittsburgh to ensure that the ad's bodies themselves meet all the requirements of the law.

A. Well, this has been going on for quite some time. We've worked with Mr. Washington and previous to that we worked with Mr. Mason of the Human Relations Commission. But it's always been a cordial relationship because we tried to work together to help each other. In particular cases where — in sex — not in sex, but in religion, race, this type of discrimination, we always tried to police this and if there is any question we call on the Human Relations Commission for their advice. If we have a problem we refer it to the Human Relations Commission, and they call us when we make mistakes

and they ask us to change this, which we do, which we fix up.

Q. What changes have you made in the sex classification?

A. Well, we run a disclaimer at the beginning of each male classification and each —

Q. Incidentally, can you tell me right offhand how much revenue that disclaimer space would bring if it were in advertising instead of in that — I was going to say silly notice, but I won't — that notice.

A. Well, that would cost approximately one hundred and twenty dollars a day, for those two disclaimers. So when you figure that its run every day, for a year, that's a lot of money. This is, if it was paid advertising, this is what it would cost.

Q. Tell us what further changes you made in the ads.

A. We changed the headings from "Male Help Wanted" and "Female Help Wanted" to "Jobs-Male Interest" and "Jobs-Female Interest". We feel this is the proper way to do it. We have worked out with the Human Relations Commission in the ads themselves to eliminate job titles that specify one sex or another, like salesman, brakeman or warehouseman and this kind. We take them in and do the job. Like "officeboy", we take out the "boy", its "office work". We take out "girl", we take out "woman", we take out "man", or "male" in particular advertisements. We try to police this carefully. We mess up on many of them, but we are still trying to get this perfected. And with the cooperation of the Human Relations Commission, I think we are doing a fine job of it.

Have you had occasion to check on the practice in other cities, on this matter?

*Hearing of February 12, 1970.*

A. Yes, we get tear sheets every day —
Q. What is a tear sheet?
A. Its one of the pages out of the newspaper. Each week we get tear sheets from the service in Chicago and — some weeks are different, but in the past — almost every week there is some from at least forty-five papers here that I have listed in front of me. There's forty-five major newspapers across the country that all carry separate male and female help wanted classifications —
Q. And that is true even today?
A. Right. This is —
Q. Incidentally, I'd like to introduce this as Respondent's Exhibit One.
A. If I may say so?
Q. Go ahead Bob.
A. This is not all the papers that run separate headings —
Q. No. I understand you.
A. They are the only ones we receive tear sheets of.
Q. Bob, explain that—why its not all of them.
A. Well, we subscribe to service for a definite reason. We want to see what other newspapers do. We solicit advertising from these tear sheets.
Q. These are ones you have personally looked at?
A. These I have seen as recently as yesterday.
Q. And none of the ones listed list their jobs other than "male help wanted" and "female help wanted"?
A. Some of them say "female interest", "male interest" but they have separate classifications for jobs.
Q. Most of them are "male help wanted", "female help wanted", are they not?
A. Right.

Q. Now, to your knowledge, Bob—and you keep up with this to a degree far more than listed by just these newspapers that send you tear sheets—What newspapers in the country do not segregate their ads by sex?

A. Well, I think this was brought up at the previous hearing. The major one is The New York Times, there is Newsday on Long Island, and there is the Wall Street Journal—and the others are in her—I think the Mirror—

Q. There are five of them in New York, are there not?

A. Well in New York and the immediate vicinity. Baton Rouge, Louisiana; Oakland, California; Honolulu; and I think a new one is the Columbus Dispatch that has come into the picture—they are classifying as "help wanted—miscellaneous".

Q. What does that mean?

A. I don't know. It could mean anything, really, and I think it was what they were planning to say. On the newspapers, we followed advertising in a lot of these newspapers that had changed to only one heading. In the New York Times I noticed "men" and "women" still in their ads. I see in the Wall Street Journal that it still says "salesman". I think we've gone farther than any of them. I think we're being very fair.

Q. Now, you've done a survey, or do you know from your own evidence, the ten leading newspapers in classified advertising lineage in 1969?

A. I can give you — I don't know if I have it here or not — yes I do. This is for eleven months. The Los Angeles Times leads by far with over thirty three million lines —

*Hearing of February 12, 1970.*

Q. Do they segregate their ads?

A. They segregate them male and female, right. The New York Times is record, with about twenty-six million lines; the Houston Chronicle; Chicago Tribune; Washington Post; Cleveland Plain Dealer; Miami Herald; Minneapolis Opinion; Milwaukee Journal; Houston Post —

Q. Of those ten which, if any, lump their ads?

A. The only one is the New York Times. It's the only one of those ten.

Q. You were about to say something when I interrupted.

A. These are, when you get to the tenth in this list of largest classified advertisers, from there 'till about the fortyith or fiftyith its pretty much the same category after you get out of the top five or six, when you drop from thirty three million down to twenty million, which the Chicago Tribune has, then they all stay pretty much in the same category — nineteen, eighteen, seventeen, sixteen — this range. The Pittsburgh Press, we run twelve. This was our total last year. There's one other point, if I may, Dick?

Q. Go ahead, Bob.

A. This was an interesting thing, I think, that back in 1964 when the E.E.O.C. ruling came about — when the law was passed — the equal opportunity law or the Title Seven was passed in 1964 and went into effect in 1955 — that the Phoenix Republican Gazette changed over to lumping their ads into one classification, help wanted period. At that time, in 1965 they received numerous complaints by mail and by phone-call. In fact, they received two hun-

dred and some complaints by phone by people who said why do you put all these ads together, why do you make it difficult for us. Well, when the E.E.O.C. reversed their ruling, I think it was 1966, —

Q. The first time?

A. Yes, the first time they reversed —

Q. They reversed it again since then.

A. They came back in April, 1966, and went back to the old way of classifying the ads. They got no complaints whatsoever about going back to the old way. Not a one. I talked to this man, this is Howard Kerr; he's the classified manager at the Phoenix Republican Gazette, and he was very helpful. This is the only one I know that when back and forth.

Q. According to your testimony, Bob, earlier in our hearing here only twenty percent of your ads come from within the city. Is that correct?

A. Within the city limits it would be twenty percent by advertisers other than employment agencies.

Q. Right. An indeterminate number of employers, then, have less than five employees?

A. I would say that a majority of our ads are from within the city with less than five employees?

A. I would say that a majority of our ads are from within the city with less than five employees.

Q. A majority of the twenty percent?

A. Of the twenty percent would be less than five. Right.

Q. The smaller advertiser tend to be —

A. Yes. This is where the barbers, beauticians, or small shop ads, and for the small company.

*Mr. Volk*: Your witness, Mr. Valadez.

*Hearing of February 12, 1970.*

*The Chair*: Excuse me, I want to ask one question to make it clear. Did I understand about the Phoenix Republican changed in '64 to one classification and in '66 changed to the two classification? Did you then say in '69 they changed again?

*Mr. Seli*: No, no. They haven't changed. When they changed back to the original male help wanted, female help wanted, when they changed back in April '66, and they are still running it that way.

*The Chair*: Mr. Valadez.

*Mr. Esper*: If the court please, I think at this time, we'd like to introduce this page which shows the disclaimer of Tuesday, February 10 of the Pittsburgh Press; its page thirty-eight and has this disclaimer at the top. We would like to introduce it if there is no objection.

*Mr. Volk*: Certainly not.

*Mr. Esper*: Would you mark this. Complainant's exhibit number six, I believe.

CROSS EXAMINATION OF ROBERT SELI

*By Mr. Valadez*:

Q. Mr. Seli, does the Press handle the advertising for the Pittsburgh Post-Gazette?

A. Yes, We are agents for the Post-Gazette.

Q. And, would you give us an estimate of the circulation of the Pittsburgh Press?

A. Evening approximately 350,000; on Sunday 750,000.

Q. And could you tell us what the circulation of the Post-Gazette is?

A. 250,000 roughly.

Q. And, what is the percentage of the classified employment opportunities in the Press as compared with the Post Gazette?

A. Well, I would say — I would have to base this on total advertising — I would say about ten to twenty percent in the Post-Gazette. You see there are several things here. You have a morning paper that is only published six days. And the difference would not be as great there if you compared six against six. When you compare six against seven, with the Sunday paper being the biggest paper, and, in fact, on Sunday, the classified might have more than would be run all week.

Q. Mr. Seli, with reference to job opportunity, does the Press offer anything other than what is shown on this tear sheet, with reference to classification?

A. Yes. We have "jobs-male interest", we have "commission sales-male interest", "male or female help" — this is a combination classification — and "job-female interest". These are the basic five classifications.

Q. In other words, the employer-advertiser would only have these, which you have enumerated, in which to place his ad. Is that right?

A. Yes, sir.

Q. Now in this disclaimer, which you told us would cost one-hundred and twenty dollars a day, —

A. That's a rough estimate.

Q. For the two disclaimers, have you turned down any advertising that could be sold because of the space for the two disclaimers?

A. No, sir.

*Hearing of February 12, 1970.*

Q. In the disclaimer itself, Mr. Seli, it states here: Notice to job seekers. Jobs are arranged, under male and female classifications for the convenience of our readers. Now, who determines what is convenient for the reader?

A. I think we have to do this. To help to get results, and help to get readership. The readers — over the years — this is the way they want it. If they wanted it differently, they would have told us so, and we would have changed.

Q. Well, Mr. Seli, who is the "we".

A. The Pittsburgh Press.

Q. Could you tell me, is it yourself in combination with other individuals?

A. Well, the policy of the Pittsburgh Press — I don't run the Pittsburgh Press and I don't profess to — but this is a policy, and if the readers wrote and stated we don't like the way you are classifying your ads, I'm sure we would change if there was enough of them. If we were convinced that this is the way the readers wanted it and the majority wanted it, then we'd do it.

Q. Mr. Seli — tell me — is Mr. Troan and Mr. Cameron on the policy staff that decides this policy?

A. Yes, I would say so, yes.

Q. Is there more than the three — you and the two that I named?

A. No. They would make the policy, they would ask me what my opinion was, and they would set the policy, there's no question about that.

Q. Now, I noticed in the second part that it says that this is done because most jobs generally appeal more to persons of one sex than the other. Now

again, wouldn't that be a decision for the three of you to make?

A. You mean on a particular ad?

Q. Yes.

A. I don't know how we could go about it. This is impossible. If on every ad that comes in to run to Mr. Troan and Mr. Cameron and ask them where we should place this ad, is that what you're saying?

Q. Don't you have general guidelines as to what category — when you receive ads from advertisers — that this is where its got to go?

A. Well, when we receive, say in the mail, from advertisers or advertising agencies which place advertising for the major companies, they specify where they want it. In their mail they say male help wanted or female help wanted or male-female help wanted.

Q. In those instances where there is no specification, then you have certain guidelines wherein you place the ad.

A. No. When we don't have a definite instance of where they stated where they want the ad, we call them or write them, if there's time, to find out where they want it, because we cannot gamble on — because the out-of-town advertising is the most expensive and its worth a two dollar phone call to make sure we get paid for the ad.

Q. Mr. Seli, on what criteria do you base your decision, when you are asked by, say, Mr. Troan or Mr. Cameron, as to what is convenient for readers?

A. Well, as I said before, this is the way that the people have indicated — the majority, we feel, still wants their ads classified in this manner. Mr. Troan,

I am sure, would receive many letters, as happened in Phoenix, if we did change it. We received several letters telling us we were crazy about the way we changed to male interest and female interest — why didn't you leave it the way it was? We received several of these, but it was not enough to change it back to male and female. Its the same as when we received these letters from NOW, or people friendly to NOW, of how they would like the ads to be classified. This isn't a majority. This isn't to the best interests of our readership.

Q. Then I take it that, really, it is from your general experience and background and how you have been trained, Mr. Seli, your personal feeling is what really what is the criteria in placing. I'm speaking of those ads where there is no preference stated by the advertiser. Isn't it your own personal feeling and your own set of rules, is what determines where you place them?

A. No, it isn't. It's where the customer wants them.

Q. I mean, assuming where the customer is silent on that point.

A. Then we ask them.

Q. Well, supposing he says, I leave it up to you.

A. Well, all right, then we tell him, we explain to him where most of these jobs run — where the interest runs. This is where the male interest runs; this is where the female interest runs. These are the number of jobs in here. And they know, the advertisers know, where they get the best results. I think Mr. Deck in his testimony before stated this. That they get better results when they run it in the separate

classification. Its of more interest to the man or its of more interest to the woman.

Is this the only type of — if I may use the word — education for your advertisers? Do you then proceed to tell them of the several categories that should go under this or that, take your choice?

We tell them where the majority is — or we try to find out what type of a person they are looking for. Are they looking for a man, or are they looking for a woman? They know this. And they are interested or more interested in a man or more interested in a woman. They know this, and they state this. This is where they want it.

Doesn't the Press, the policy that you have stated, the Press policy, in your opinion, Mr. Seli, would it frustrate the efforts of employment agencies and employers who wish to avoid discriminatory practices but who cannot afford to publish the same ad in both male and female interest columns, and who feel that the publication in the considerably shorter male-female column is less effective.

No, I don't think that. It would be less effective if it was jumbled together. I don't have any doubt of this —

Did you say it wouldn't be?

It would be less effective, if it was all lumped into one classification. Its the employment agencies or the advertisers, and we're back to this again. If they felt that they would get better results by placing it in one classification, they would be screaming at us, you know, just make us change it, because it might cost them additional money. But they are looking for results; and this is why they are advertising.

Many newspapers run a separate employment agency advertising period. Just employment agencies. We could do this too, but it is not in the best interests of the employment agencies and they don't want it. Many cities have started and they screamed and took it out, you know, where they had employment agencies listed separately from the other help wanted. And they changed it, back to where its intermixed with the regular help wanted. This is where they get their best results, because it has the best readership.

Q. Well then, the policy of the Pittsburgh Press is to accede to the wishes of the advertiser, primarily.

A. No. To the readers, primarily.

Q. To the readers, primarily. Well then I'll ask you once again to state, Mr. Seli, that this is determined by a committee you talked about. You and Mr. Troan and Mr. Cameron.

A. Yes. This has been the procedure for many, many years.

Q. Now, Mr. Seli, I believe you are familiar with the ordinance adopted by the City of Pittsburgh, with reference to discrimination. You are?

A. I've read it.

Q. Let me read, under definition, Mr. Seli, under section 4(b). Discriminate and discrimination. The terms "discriminate" and "discrimination" include any difference in treatment based on race, color, religion, ancestry, national origin, place of birth or, as amended, sex. Now section 8 —

A. What page are you on?

Q. Oh, this is page three — under definitions — 4(b) as amended, of course, adds sex. On page 10, under

(j), this would be section 8(j). The opening paragraph starts: It shall be an unlawful employment practice, etcetera, except where a bona fide occupational exemption is certified by the Commission etc., and then I refer you to (j), for any person, whether or not an employer, employment agency or labor organization, to aid incite, compel, coerce or participate in the doing of any act declared to be an unlawful employment practice by this ordinance, or to obstruct or prevent any person from enforcing or complying with the provisions of this ordinance or any rule, regulation or order of the Commission, or to attempt directly or indirectly to commit any act declared by this ordinance to be an unlawful employment practice. Now, this is what the ordinance says, isn't that right Mr. Seli? Now, do you feel if the advertiser wants to discriminate on the basis of sex and you accept his advertisement in the paper, are you not aiding?

*Mr. Volk*: I'm going to object to that. I'm the attorney for the Pittsburgh Press, not Mr. Seli. So long as I am retained by the Pittsburgh Press I think it is my obligation to give the Press advice as to when they are or when they are not violating the law. I don't think Mr. Seli is qualified, or competent, to make legal interpretations under the guise of cross examination.

*The Chair*: Would you repeat the last part of the question?

*Court Recorder*: Do you feel if the advertiser wants to discriminate on the basis of sex and you accept his advertisements in the paper, are you not aiding?

*Hearing of February 12, 1970.*

*The Chair*: The objection is sustained.

Q. In the Press classification, as it stands today, is there a difference in treatment based on sex?

*Mr. Volk*: Same objection.

*The Chair*: Could you repeat the question?

*Mr. Valadez*: In the Press classification of jobs, as it exists today, and as it has been for awhile, is there a difference in treatment based on sex?

*Mr. Volk*: You see, the reason I am going to object is that there obviously is a difference in treatment, because we have them under male interest and under female interest, but as used in the ordinance "difference in treatment" is a word of art. And once again we get into Mr. Seli, if he answers the question, giving in essence a legal opinion as to whether or not this is a difference in treatment within the meaning of the ordinance. Of course its not. A layman ought not be allowed to get into that trap. And this is a valid legal argument, which the complainants may make, but it belongs as legal argument and not under the disguise of testimony of the advertising manager of the Pittsburgh Press.

*The Chair*: Well, we will not sustain your objection here because the question, while maye be the word of art, the question is factual, and therefore I will direct the witness to answer the question.

*Witness*: Will you repeat the question?

*Court Reporter*: In the Press Classification as it exists today, and has for awhile, is there a difference in treatment based on sex?

A. I would say no.

Q. Well, do you consider the placing of an ad under a specific heading an expression of a preference, limitation, specification or discrimination based on sex?

A. No.

Q. I think in your testimony earlier, Mr. Seli, you stated that it would be simpler, and actually easier, for you to eliminate the differences, or as you state it, lump them all together — the job classifications?

A. Right.

Q. And how did you arrive at the figure of fifteen percent as the percentage of ads by employees with less than five employees? Is that just a guess, an educated guess?

A. This is an estimate on my part, after looking at the ads and seeing the number of ads. Yes.

Q. Then it would be a guess, right?

A. An estimate, a good estimate.

A. I don't know how you can prove it or find out how.

Q. There are certain areas here where what you are doing, what you are really doing Mr. Seli, is guessing. Right? In quite a few instances. Is that right?

A. In what way?

Q. Well, you are guessing about what's good for the reader, convenient for the reader, with —

A. No, this is no guess. We know this.

Q. And as you stated, it was easier to lump in one unit, in one classification — it would save money really — would not then you and Mr. Cameron and Mr. Troan have to make a policy to have a single job classification?

A. Yes.

Q. I think in your testimony you said that you be called upon, Mr. Seli, to make suggestions to the policy committee. Is that correct?

A. For my opinion, yes.

Q. They would call you in for your opinion. Do you actually help Mr. Cameron and Mr. Troan set the policy?

A. No. They ask me for my opinion and then they set the policy.

*Mr. Valadez*: I have no further questions.

REDIRECT EXAMINATION OF ROBERT SELI

*By Mr. Volk*:

Q. Tell me, Bob, did you take a survey of the letters to the editor received after the last series of hearings in this case? Did you get an opportunity to do that?

A. I think they all appeared in the newspaper. I checked with Mr. Troan and he said he ran all the letters he received.

Q. Right. How often are you asked, how many times a year are you, the manager, asked where the ad should be placed? In other words, the complainant put in a lot of cross-examination about your being asked by an advertiser where should I put my ad, under male or female. How often does this occur?

A. Under male or female, I've never been asked. They'll ask me on a miscellaneous ad where its a question of whether it should go under equipment or under automobile or something like this but I've never asked what classification should I run this in.

*Mr. Volk*: No further questions, sir.

*By Mrs. Reizenstein:*

Q. Sir, you made a point of ads that come in and out of the city. Are you aware of the state law, that it also includes the sex provision?

A. Yes, I am aware of that law.

Q. Have you had any communication from the State Commission as to guidelines or any problems related to their law?

A. Yes, we have. This was, I think, a news release sent out by the Human Relations Commission of the state. That is about what it was.

*Mr. Volk:* If I may interject, a news release under the guise of a guideline, which has never been to our knowledge promulgated as a guideline. Done so without following the requisite state procedures for issuing regulations. Was done under most unusual circumstances. And we did have a meeting with representatives of the State Human Relations Commission to protest the irregularity of this "news release — guide line, or whatever it was", and the results of that have been most inconclusive. I think they decided not to rescind it, but to our knowledge no action has been taken.

Q. You indicated in 1966 the EEOC made a finding and then reversed it, is that correct?

A. They made their first ruling, I think, effective July of 1965. And then they reversed this ruling, saying you could not use separate "male—female" headings. Then they reversed it in '66 and said it is permitted to run separate headings and run a disclaimer. Then, I think there has been a disclaimer on this.

Would you give me the dates again?

*Hearing of February 12, 1970.*

*Mr. Volk*: Mrs. Reizenstein, I think we object to introducing it.

*Mr. Albright*: Tuesday, February 4, 1969, effective date of guidelines.

*Mrs. Reizenstein*: We will have that.

*Mr. Volk*: Yes, that was done by a three to two decision. We will have some authorities on that, too.

Q. You indicated it would be probably 15 per cent of those who have five or less employees. How would you know this? Do you ask each advertiser?

A. No, this is why I say it is a guess, Mrs. Reizenstein. You couldn't ask them. How could they tell you? How would you know you would get an honest answer? This is why we are put in jeopardy.

Q. You have been asked, Mr. Seli, by both Mr. Mason and Mr. Washington and the State Commission people, in coming to some understanding, how you would deal with ads on race, religion, and so forth?

A. Yes.

Q. Do you see any difference between the sex discrimination and the other discriminations that are part of the law?

A. The difference between race and sex?

Q. Yes.

A. Definitely.

Q. You do?

A. There is a difference in sex. I don't see any difference in race and color.

Q. But it was important enough for the state and federal government and city to include in the law?

A. I don't know.

Q. Would that be of any value once it is on the books?

A. I don't think the law applies to the newspapers. It doesn't state this. I am not a legal man, but I don't think it applies.

Q. But there was an understanding between the Commission and the state relating to the other provisions; is that correct?

A. This I don't know. I can't speak for other newspapers. As far as the Press, the city ordinance working with the Human Relations Committee — it does a better job working with the City than the state. They have a much better working relation and better rapport.

Q. You indicated employers and agencies have some concern about this and you think this reacts negatively for them? Do you recall that the same was true in the other provisions in the past? It took sometime before employers and agencies really accepted the principles of the nondiscrimination laws.

A. No, I don't think so. This was no problem. This was a very easy matter to do. I think everybody believes or is against discrimination in other fields, but can't see where they are the same. There is a difference in sex where there is not a difference in religion, race or creed or color.

Q. But there was a problem in getting compliance; is that correct?

A. Right. And we told the people how we wanted it run, and they listened to us.

By *Reverend Johnson*:

Q. I just have a question concerning after the first EEOC guideline had come down, or decision had

come down. You mentioned one paper that shifted and got many, many complaints. I was just wondering if that paper — Do you know of any study that was done or any attempt that was made by the newspaper either to educate the public as to why it was changing along this line?

A. No, I don't. I don't think they made any attempt. They just went ahead and changed them. It was the law. I think the same thing happened there — a ruling. They took it as law, and it wasn't law. The same thing happened in the state recently. The sent out this news release and many newspapers, little newspapers, thought it was the law. And it was not the law. It was an opinion.

Q. Since the law has been changed, has the Press made any attempt to educate its advertisers, those who are advertising as to what the ordinance indicated? Now, you may not think it was the Press's job, the newspapers in general.

A. No, because I don't feel, they don't feel it is their job to do it. I don't know what the New York Times did, but they are a different breed of cat. They are a big paper and a different community.

Q. I asked that for the very reason, whether the newspaper industry feels when these things change they have the responsibility to do this. Or do they not feel it is their responsibility?

A. I feel the newspapers wish to uphold the law, and they try to do it when it is the law. And they definitely try to educate people when it is a part of the law. And they obey the law of the land. I definitely feel they do.

*Mr. Volk*: If I may interject as counsel. This is the very thing; that we feel it is not the law. We don't feel the Press has to do what the Complainants ask them to do. We don't feel we are violating the law. That is why we are here.

*By Mr. Esper*:

Q. At the state's human relations meeting, who attended from the Pittsburgh Press?

A. Mr. Volk and myself.

Q. With the State Human Relations Commission?

A. Yes.

Q. Now, just one more question. If the Press were to switch over to this lump advertising, lump it into one unit, would there be any significant change in revenue to the Pittsburgh Press?

A. No, not immediately. But I am afraid if the results fell the number of ads would fall, to. If the customers didn't get the results, they would discontinue to advertise.

Q. Where else would these people advertise, if not the Press?

A. Post-Gazette.

Q. I say if not the Post-Gazette and Press?

A. Local papers. This takes in the whole Western Pennsylvania. There are a number of newspapers in there — Beaver, Butler, Uniontown. They all have daily newspapers, and they are not bad. Washington. They are close in. They are competition now. With regular advertising and television and radio — they are all competition.

Q. If all the newspapers were to obey the law —

*Mr. Volk*: I object to that conclusion. They are obeying the law.

Q. Well, if all the newspapers were to lump their ads into one column, what significant change would there be?

A. The same changes of the Pittsburgh Press. The same changes we had in compliance. The loss of revenue in loss of results.

Q. Well, Mr. Seli, if all the papers were to do this, the one that you mention, the various publications — if they were to do this, how could it affect the Press and Post-Gazette?

A. They can go to other media.

*Mr. Volk*: They are not covered by this ordinance.

*Mr. Esper*: The state?

*Mr. Volk*: They are not covered by the state.

A. At least we are acting in the spirit of the law as set forth in the constitution.

*Mr. Volk*: Set forth by the National Organization for Women.

*Mr. Esper*: That is objected to as unnecessary comment.

*Mr. Volk*: Anything further from the Commission?

*The Chair*: We will take a five-minute recess.

Will you please come to order? Both counsel, I understand, requested that we adjourn now and reconvene at one-fifteen. Is that correct?

*Mr. Volk*: Yes.

*The Chair*: In that case, we willl stand adjourned until one-fifteen this afternoon.

(The hearing reconvened at 1:27 P.M.)

*The Chair*: Will you please come to order? Mr. Volk.

*Mr. Volk*: For our second and probably last witness, I would like to call Mrs. Peters to the stand please.

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DR. JEANNE PETERS, called as witness for the respondent, and having been duly sworn, testified as follows:

DIRECT EXAMINATION OF DR. JEANNE PETERS

*By Mr. Volk*:

Q. Will you state your full name, please?

A. Jeanne Peters.

Q. And, what is your job? What is your profession?

A. I'm an industrial psychologist with Psychological Service of Pittsburgh.

Q. And what are your qualifications for that position? What is your education?

A. I have a Ph.D. degree from Duquesne University and a Master's degree before that from Duquesne.

Q. And how long have you been a practicing industrial psychologist?

A. Five years.

Q. And as an industrial psychologist with the Psychological Service of Pittsburgh, what do you do, essentially?

A. I have two job activities with which I am primarily concerned. I spend most of my time in motivational

research and the rest of it in what we call a consulting capacities in the appraisal and measurement of aptitudes and interests for jobs.

Q. Did you make a survey of the literature and works done on employment of women and motivation of women at my request?

A. I did.

Q. Would you discuss for us, and feel free to refer to your notes, the presence or absence of a female interest, that is, jobs-female interest versus the jobs-male interest? Where the differences between men and women and the types of jobs they may prefer?

*The Chair*: Would you speak a little louder, please?

A. Yes, I'm glad to. I'd like to give three points here — three types of information that . . .

*Mr. Volk*: Mrs. Peters, they still have trouble hearing you. I can hear you perfectly — it's just in the other direction.

A. First, I'd like to establish before I go into some of this material so that people are not confused that I hope to bring into the record at this point what I consider to be experimental evidence as opposed to theory. So, I'll hit two areas that I feel are scientifically valid areas of evidence on differences between men and women.

The first is in the area of what we call job interest inventories, that are used frequently by psychologists in their profession. Summarily, I might say that on all of the inventories that we use in our company there are significant mean dif-

ferences on the scales of the job interests between men and women. Second point, . . .

Let's stick to that one for a minute, if you will. Do women tend to score higher on different types of jobs? Is that what you mean?

Yes.

What type of job, for example, do you find statistically that women tend to prefer?

On the basis of inventories, I would say that you could group all the job interests for women as jobs involving people. And, that's probably the biggest group, individually. Otherwise, we could say, professional nursing and teaching. Women score higher on these; and on engineering, business management, law, etcetera, men score higher than women on those.

Go ahead with your statement.

All right. A review of areas of participation of women in the labor force shows that fourteen out of seventeen occupations which were seventy percent female in the year 1900 are still seventy percent or over female.

Could you name some of them?

Yes. I don't know that I have all fourteen of them here. I would say librarians, nurses, teachers, secretaries, telephone operators, dressmakers, textile workers, office receptionists, dental assistants, on down the line.

Go ahead.

Statistics on the selection of college majors show men to be concentrated in the more traditionally "male" occupations and women in the more "female" occupations, if you want to say that. More-

over, differences between the sexes in their choice of the type of college majors became more marked as the undergraduate years progressed. Men have been found to be much more likely than women to remain in, or be recruited into, business, engineering, physical sciences, and mathematics whereas women are more likely to remain in, or be recruited into majors in the arts, humanities, and education.

Furthermore, and I think this is an important point, too, a woman who starts college planning a career in one of the more masculine majors is less likely to end up pursuing such a career four years later than she is to switch to one of the more traditional female majors.

In summary, the percentages of women that are only employed for some jobs are quite high, and I am basing this on census bureau of statistics. Statistics show that eighty-six percent of librarians, ninety-eight percent of nurses, seventy-two percent of all teachers, eighty-eight percent of elementary teachers, ninety-three percent of dietitians and nutritionists are women. Moreover, forty-three percent of all women employed in professional or technical occupations are teachers, twenty-two percent are nurses and two percent are librarians. These three professions account for sixty-seven percent of all professionally employed women.

On nonprofessional levels, ninety-eight percent of physician and dental office attendants are women, ninety-eight percent of receptionists and ninety-six percent of stenographers and secretaries.

On the other hand, only one percent of engineers, eight percent of physicians, three percent of scientists in general are women.

Q. Now, can you give some scientifically grounded reasons why females tend to prefer certain occupations?

A. These jobs which have remained largely populated by women have a number of common characteristics which, in my feeling and in the feeling of most of my colleagues, promote the attachment of the female sex label. Moreover, many of these characteristics hold considerable appeal to the majority of women.

Q. In other words, your testimony is that they are not forced into these occupations, but that most women actually do indeed prefer to follow these occupations.

A. I would take that stand.

Q. Go ahead.

A. For example, the major female professions, nursing, teaching, and librarianship, are traditionally female occupations. Most of the training for these jobs is acquired before employment. Career continuity is not essential.

Q. What do you mean by that?

A. I mean that a woman doesn't have to say that she's going to be there for the next thirty years in order to qualify for the job.

Q. In other words, she can stop, raise a family, and come back.

A. Right. These jobs exist all over the country and so mobility, or lack of it, is not usually a serious handicap.

Q. In other words, you mean being forced to move with a husband or stay with a husband is not a handicap for performing one of these jobs.

A. Right. Diligence and a certain devotion to the job are required, but long range commitments and extensive sacrifices of time and energy are not necessary. Employment in such occupations relatively infrequently puts the worker in a supervisory position of male employees, although she may be in a position of relative power over those outside the organization.

Q. Now, can you contrast those jobs with male interest?

A. The male professions, on the other hand, which are predominantly male, for example law, medicine, university teaching, architecture, and the clergy differ in these respects. Generally, these professions require investments of time, energy, and devotion, extended, often difficult schooling, and a lifetime of overtime work. Continuity is usually essential, and the ability to move or not to move may be important factors in whether or not success is achieved.

It's hard for me to believe, as an individual and a woman, that if a strong desire to break into other types of work had prevailed among women, in general, they would not have made greater headway into these predominantly male occupations within the recent years. There are a large number of studies supportive of a tendency for women to move slowly in changing the status quo.

Q. Do you have some statistics to back that up?

A. In a survey conducted by the Women's Bureau of the Department of Labor, only eighteen percent of women college graduates said they planned to have a career, although most were working or planned to work at some point in their lives.

A survey of female college graduates three years after graduation questioned women on the types of success they viewed as most desirable. The most frequent answers were: to be the mother of several accomplished children or to be the wife of a prominent man. While over forty percent of college graduates are women, only eleven percent of the doctorates are conferred on members of the female sex.

In another study, only fifty-eight percent of a group of over twelve hundred academically gifted freshman women obtained a degree. Moreover the percentages of women completing a degree differ for various majors. A larger percentage of graduates have majors in education, social services, and home economics; while more of the nongraduates had business, natural science, math, English, and language majors.

Q. Are there differences in interest in graduate training as they go on?

A. It has been found that during the undergraduate years, a man's interest in graduate training tends to increase more than a woman's. Women have been found to have initially lower levels of educational aspirations, and even shorten these as college years progress.

*Hearing of February 12, 1970.*

Finally, studies show that two out of three high school females change their vocational goals by the time of college graduation.

I think it's important to bring in here that the adolescent years for a woman are very impressionable years, and it is at this point that many women decide what they are going to follow for a career. I think the interesting part to some of this research is that it is not during high school years that the women do not choose "atypical" professions, or male professions, but quite a number of them start college with these ideas, and give up. . . .

Q. . . . following a profession not typically "female".

A. Right. But, very few of them follow through to college graduation.

Q. In other words, the pressures of conformity are intense during high school, but they leave high school tending to follow a non-usual career, and then change in college. Is that right?

A. Right. They generally do. One of the main concerns of the company with which I am associated is research in the area of job motivation. Investigation into the sources of job satisfaction has shown considerable differences between college women and college men applying for management training positions.

In a study of the sources of job satisfaction and dissatisfaction among college graduate women and men employed in the field of communications, I found marked differences in the sources of satisfaction of the men and women. The women were more highly influenced by affective peer relation-

ships, relationships with the boss and needs for being respected, feeling important and feelings of progress in the job.

Q. These things were measured?

A. Yes. On the other hand the men were considerably more influenced by experiences of achievement and failure. The sources of male happiness and unhappiness are more related to the job itself and the career involved. For women are more attached to the total job situation — that is, supervision and fellow workers. These women enjoyed becoming involved in all phases of the job situation and had strong desires to feel needed and important but without having aspirations for managerial authority. Only one-third described themselves as career oriented. The majority reported working to supplement family income or to become involved in a variety of activities and to meet people.

Q. Now, having established that this interest exists, and establishing how these varied interests do indeed legitimately exist, can you give us some underlying reasons why these interests are different between male and female? I think some of our opponents here would ascribe them all to some part of a masculine conspiracy to oppress all women. Can you give us something perhaps a little more scientific and a little more rational that would account for this disparity in job preference?

A. I think I'll try and point out the weight of the evidence in the scientific literature that there are differences in the male and female job interests and motivations. And the psychological reality of the term "female interests" is a very valid one.

Summarily, there are a number of jobs which are primarily populated by women, and the majority of women are employed in these jobs. The fact that a particular minority of individual women do not have these interests does not constitute grounds for dismissal of a concept as scientifically or experientially invalid. In hearing the previous testimony, I have the impression. . . .

Q. Incidentally, you have sat through the previous hearings?

A. Yes, I have the feeling that a few global generalizations have been made, and a few theoretical formulations presented as fact. Particularly, the disavowal of any biologically based sexual determinants of human behavior. Such as a statement would appear somewhat naive in the face of four hundred and twenty-five studies reported under sex differences in the psychological abstracts for the year 1968 alone. These studies encompass a variety of physiological and sex related differences from recorded eye-movement, frequency of migraine headaches, tendency to hysteria, body sway, reaction time and pure tone thresholds for hearing. That this large number of psychological and physiological dimensions of sex related behavior has been the focus of so much research should give sufficient weight to the fact that the human person cannot be viewed without his body or his sex. moreover, to ignore bodily development in any attempt to maximize human potential is to defeat the cause of humanism.

Q. Are you saying, in effect, that there are a few distinctions between us that would indicate that

there are a couple more bona fide occupational qualifications than sperm doner or wet nurse?

A. I'd like to think so. I think it's important to bring out here that if we just want to take the minimus amount of achievement in a job is one thing, but when we talk about social change and the maximization of human potential, I think it's important that we get down to business and look at the facts. And the fact of the human person is very significantly the fact of his or her body. The willingness to close off this area of human possibility — the human body — is reflected in the assumption of a position that society has limited girls from opportunity for full development in their capabilities by not expecting them to assume certain roles in society. This point of view states that given equal opportunity and could be as masterly as men. The achievement of this goal would prevent any role conflict on the part of women in management since they then would operate as men. Such an assumption implies the conviction that to be feminine is basically inferior to being masculine, and, also, that women have nothing unique to contribute as a force for social change.

Indeed, it would appear critical to our times that all varities of human possibility be explored and recognized for the fullness of the unique female potential. To ignore the weight of such important contributors to the field of psychological theory as Jung and Erik Erikson in their specification of a uniquely female perspective is yet another form of discrimination against women.

Q. In other words, you are telling us that there is such a thing as the feminine personality, the feminine—to use the favorite word of the founder of our tormentor organization, Mrs. Friedan — the feminine mystique, and that this is not all culturally imposed.

A. I'd hate to think so.

Q. To your knowledge does the literature show that it is culturally imposed?

A. No.

Q. We heard some conversation about some relatively well-known studies — I'd heard about them myself — done by Margaret Mead on the natives in New Guinea, could you comment on that — cultures where the females seem to be more aggressive than in other cultures where the men seem to be . . .?

A. Well, I am sure that if Dr. Mead observed it, it was a valid observation.

I think maybe generalizing it to cover all societies might have been a mistake.

I think one thing I have noticed in reading is that there is no society in which there isn't some difference between — some specification of two different sexes. One or the other.

Regardless of the role that the specific sex plays, there are still only two sexes, and the roles assumed by them are differentiated.

Q. In other words, in no culture you've been able to discover in your reading of the literature is there a unisex?

A. No.

Q. Can you view man without his culture?
A. No.
Q. Can you comment on that, please?
A. Man is a social being who lives in the world. When he's not living in the world, he's not living. So, he interacts with the world.
Q. This produces culture?
A. Right.
Q. Culture produces job preferences?
A. I think so.
Q. Did you have occasion to discover what percentage of the American labor force is women?
A. About one-third.
Q. One-third?
A. Yes.
Q. Did you notice the age—that is, does the percentage increase or decrease with age?
A. Yes. There is a large percentage who work before they are married or their first child. Then, there is a drop off in the percentage of women in the labor force. Between forty-five and fifty-four—something like that—I think it is sixty percent of women in this age group work.

*Mr. Esper*: Is that last statement that sixty percent of women work at that age?

A. I believe that. I'd have to check it for you. Between fifty and sixty percent of women in what we call the middle aged period, forty-five to sixty, . . .

*Mr. Volk*: Thank you for raising it to forty-five. (Laughter) You got that?

Q. Have psychologists been able to differentiate psychological characteristics of those women who tend

to be career oriented versus those women who tend to follow the traditional role?

A. By career oriented I mean women who put the job before everything else, who when asked to write what sources of activity are the most important to her lifetime will write the job is first. These women have been found to be higher in their needs for achievement and for status, or shall we say not status but fame, than the average woman.

Q. Were you able to discover or could you give us any opinion as to whether or not these women would be diffident about looking under jobs-male interest or jobs-female interest and applying there for jobs in their chosen careers?

A. No. I'm sure they wouldn't.

Q. You sure they would not be diffident?

A. No. I think not.

Q. Can you draw a distinction for us between the old feminism, as we have come to know it, in striving for gains for the female, versus the new feminism that's defined in psychological works?

A. Yes. The old feminism was based on a certain set of assumptions that the male was the role, the position, to have and that the female was operating under a significant biological handicap, and that by achieving equality with the male she would, shall we say, fulfill herself. I think it is interesting to note that during the time of getting the vote was a time for important social change. Unfortunately, the vote in the hands of women did not affect this change. Now, in our day, I think we are beginning to question more of our basic assumptions more.

Psychology is looking at a more humanistic

people oriented operant for behavior, and I think the new role for feminism in our times is to maximize the uniqueness of the female person in what she can contribute to society. Not by equating her or her roles to that of the male. I think by doing so it is assuming that what men have achieved in the past sixty years in our century is good, and I think anyone who is interested enough in social change will raise some question as to what the men have achieved. But, by identifying with men I don't think we are going to maximize female potential and I am hoping that the emphasis will be that of the uniqueness of the female person.

Q. Which would account for an interest in certain roles that are uniquely feminine. Correct?

A. Right.

Q. Which maximize the utilization of the . . .

A. Right.

Q. Rather than a denial of this.

A. I don't think we can ever deny that.

Q. We've heard them deny it! We don't think that invalidates the matter.

A. I don't know if as women we can—maybe as proponents of a cause, we might.

Q. In your experience as an industrial psychologist, which of course involves the work, psychology as it applies to jobs, getting jobs, holding jobs, have you found any such distinctions, cultural or otherwise, between the races or between nationalities or between religions that would manifest themselves to any significant degree in differentiating job interests?

A. I don't think so—not in my personal experience.

Q. Nor in the literature?

A. No.

*Mr. Volk*: Your witness, Mr. Valadez.

(A ten minute recess was had.)

CROSS EXAMINATION OF DR. JEANNE PETERS

*By Mr. Valadez*:

Q. Mrs. Peters, you obtained a master's degree at Duquesne University?

A. That's right.

Q. In what subject? Psychology?

A. Yes. Psychology.

Q. And then for how long did you go on to get your Ph.D.?

A. I completed the program there?

Q. You completed the program?

A. Yes. At Duquesne.

Q. How long did it take you to complete it?

A. About seven or nine years.

Q. And was it after you obtained your Ph.D that you obtained this job with Psychological Service of Pittsburgh?

A. No. I was hired there before I completed it.

Q. I see. And in your job as an industrial psychologist in this field you talked about motivational research and also acting in a consultant capacity—would you explain to me again this consultant capacity? What were your duties there?

A. We have a hundred and fifty contracts in the city—that is, clients. On various occasions, for one reason or another, these companies use our services. For example, if they are considering a person to be ad-

mitted to a training program or for promotion to a management position or for placement in a particular job or etcetera, then they request that the individual come to the company and we will test him or her, interview this person, and write a report summarizing our conclusions and recommendations and to their desirability for this particular job.

Q. Do you do this alone or with anybody else?

A. There are ten of us on the staff of this company.

Q. Are the other nine male or female?

A. There are six men and four women.

Q. On this level?

A. Yes.

Q. Now, tell me a little bit about this motivational research. What does that mean?

A. We have done rather extensive research over the past few years. We have recently finished a book which has been published by the American Management Association called "The Motivated Modern Adult". This was—

Q. Pardon me. When you say "we", who is we?

Q. Are these the ten people you were talking about?

A. No. Dr. Ray Hanson is the department head, and myself. Under a grant from the Alcoa Foundation we completed this book. Its a survey. And we developed over the past five years a number of scales for measuring work motivation in adults. Summarily, that's what's in the book.

Q. You eluded to something about the three types of information that you look for in this motivational research. Is that correct? You talked about experimental evidence against theory. Would you reject theory and apply experimental evidence?

A. I'm not clear what you're asking me.

Q. Well, I think you stated that you were looking for some types of information. Would you tell me what types you were looking for?

A. In my job?

Q. Yes.

*Mr. Volk:* I'm not sure she could.

Q. Well, when you were talking about motivational research you mentioned that there were certain types of information that you take into consideration. I believe when you make your decision to place—

A. On management motivational research that is qualified result psychology. In other words I have two types of roles there. The one: if you were to come, for example, to our company I would give you some tests; I would interview you to see your interests; I would administer to you motivational inventories to try to figure out where your motivation lies. And then, I would write a recommendation on you. Now this is not my research capacity; this is my capacity as a consultant.

Q. Would you apply the same standards regardless of whether a male or female came to you?

A. In the routine I go through?

Q. Yes.

A. Certainly. Females are treated the same way as males as far as what we would prescribe for her in the course of the day and as far as the fact that she would take tests, be interviewed and have a report. Now that's broad.

Q. I think you did testify, Mrs. Peters, that there are biological differences between the sexes. And do

you think that categorizing the jobs as male or female in the newspaper, or mass media, generally might actually help produce some of these preferences.

A. No. I do not believe that.

Q. Do you think that categorizing these jobs as male or female in the newspapers or mass media generally might actually reduce some of these preferences?

A. No.

Q. I think you were here when we had the original hearings. Do you remember when Mr. Volk mentioned that Jews are overrepresented in the legal profession and it is well known that they are overrepresented in colleges and many professions such as social psychology, for example?

*Mr. Volk*: I didn't say over-represented. You want to offend me to my friends. Some of my best friends are lawyers! Some of my best friends are women!

Q. Well, you've heard it mentioned that the Jews tend to become pawn-brokers, lawyers — they go into fields. Right? Now, would you agree that there are differences in job preferences between different ethnic groups?

A. On the level of people I work with, I consult on,—

Q. You what?

A. I would say that in talking about the professional people that I deal with in my work—now I don't usually see hourly employees— if you're talking— I serve as a consultant primarily in professional placement—on that level, I would say no.

Q. You would say no. Is that right?

A. I would say no right now. I would look into it, you know.

Q. Well, what evidence do you know about ethnic groups in connection with vocational interest tests?

A. I don't know anything.

Q. You know nothing?

A. No. I've never looked into this area.

Q. Well, how about aptitude tests or intelligence tests?

A. As far as ethnic groups go?

Q. Yes.

A. What do you mean by ethnic groups?

Q. Well, Mexicans, Italians,—

A. I know of no differences there.

Q. You know of no differences?

A. No. I have no first-hand information.

Q. You mentioned, I believe, that in 1900 about fourteen out of seventeen jobs are still in the same ratio today? Is that correct?

A. Right.

Q. Well, isn't that also true of janitors, porters and so forth—?

A. I'm not sure. You mean male—janitors as male, as opposed to cleaning ladies?

Q. Yes.

A. Yes.

Q. So then, the tendency, Mrs. Peters, is that at that particular time in the nineteen hundreds, women regulated to a more or less second-class type of existence. Is that right?—as compared with men.

A. I disagree here. If you are talking about the fact that in nineteen hundred over seventy percent of

the teachers were women, I wouldn't call this second class.

Q. Seventy percent of the teachers—

A. Over seventy percent of the teachers at the turn of the century.

Q. Well, you did mention that the teachers, the nurses, the librarians, etcetera — that this, primarily, is where most of the women go. Is that right?

A. Yes.

Q. And, what I'm trying to get at is how do we upset this balance? Perhaps a woman wants to be a doctor. Why is it that eleven percent, as you testified, of the women become doctors in the United States—

*Mr. Volk*: Ph.D's. Ph.D's.

*Witness*: Yes Ph.D.'s. There are only eight percent of medical doctors.

Q. Do you know how many physicians?

A. Eight percent.

Q. Eight percent of the physicians in the United States are women. Is there any difference between people here and people in the Soviet Union?

A. I don't know.

Q. And can you tell us why in Russia seventy-five percent of the physicians are women and only eight percent are—

A. I think this is something—is a statement that has been thrown out, which is one of the global generalizations I referred to here. It is certainly common knowledge that in Russia seventy-five percent of doctors are women. I'm not entirely sure what a doctor is in Russia.

Q. A doctor?

A. I don't know. I've never been in Russia. So I don't know if there are enough doctors as doctors in Russia. I read somewhere that in Russia, that there are no teachers who are women.

*Mr. Volk*: If I may interject. In Life magazine they had quite a feature article on medicine in Russia and it described doctors, and doctor's assistants, and they had a name for these women that aren't quite doctors. I refer the board to that issue.

Q. Well, in the same article it showed that women in Russia are—

*Mr. Volk*: It was an article on Russian medicine, and it showed that Russian medicine is fractionated into doctor and assistants that have a name that begins with F which escapes me, but—

*The Chair*: That name is spelled FLCCZR.

Q. Mrs. Peters, there are a small number of women in law, medicine, and engineering. What about this for the United States? Would you care to comment?

A. There are a small number of women in psychology. I am one of them. I think I could comment on that.

Q. Why is that? Why don't more women go into psychology, medicine and engineering?

A. I think there are reasons. I think it is a rather complex issue. There is a positive and a negative attitude in trying to sum up why. We can say that there aren't any because women haven't been expected to be in these professions. And then you

can say that there aren't any because they want other things very early in their lives, which they particularly jump in on as soon as the opportunity is presented to them, and they quit college and they don't go on to get them. I don't know how many women who quit college are sorry they didn't go on to get them. I haven't done any investigation of that. But they might not be getting them for other reasons too.

Q. You didn't conduct in conjunction with anyone else any reason in this line, why women don't pursue what you had testified previously to an aggresive type occupation restricted to the male. You have done no independent work?

A. No.

Q. Nor in conjunction with anyone else?

A. No.

Q. I think what you have testified to, from the notes I have, isn't that also work — those statistics you gave us — work done by others?

A. That's right. The studies I have been personally involved in concern motivational factors in women.

Q. Isn't it true that limited opportunities help restrict interest in certain occupations?

A. Yes.

Q. It would?

A. Yes. I think if someone strongly convinced me that I couldn't get into something, I might use prudence and try something else.

Q. And not get into it?

A. Yes, but I don't know how much it takes to convince a person in this day and age.

Q. What effect do you think it would have on a women's motivation to apply for or show interest in positions that are categorized as male interest?

A. I'm not sure that there is any.

Q. There is none? You don't feel that a woman—

A. I haven't seen it if there is any.

Q. Well, did you hear the testimony earlier — a lady here said that she was really intimidated, when she was applying for a job and found that what she could do was under male-interest and under the female-interest there wasn't a similar type job.

A. I wasn't too struck by that, for the simple reason that I wasn't quite sure what was intimidating her. Whether it was the fact that the job was listed under male-interest, or that she wasn't quite sure that she had the qualifications to be looking for it in the first place.

Q. But that's the point. Don't you feel then that by placing the job this woman was qualified to do this work — placing it in the male section connotated something she didn't have, biologically or otherwise?

A. Not necessarily. I wasn't entirely convinced that she was fully prepared for, or in her own mind, adequately prepared for the job in question. I think there was a question there. I think it was a certain anxiety that came from not being sure of herself, that she could do it.

Q. Well, in your opinion, would women generally be reluctant to intrude on what is culturally viewed as male territory?

A. Not as much today. I think we've taken over a lot of the men's world.

Q. You've what?

A. I think we've taken over a lot of men's things and have done so without forcing our way in. We run the home, we balance the budget, we do a lot of things.

Q. You alluded in your testimony, Mrs. Peters, to something about Erik Erikson. What was that?

A. Erik Erikson postulates that whereas the male has a certain bodily stand in the world, constituted by his maleness, that there is a uniquely female characteristic which is governed by the fact of an inner space of the woman. This inner space is an existential concept that permeates everything that she does. Consequently, the way she operates in life has a possibility of bringing things to her, of finding new organization on owness, feelings of intimacy and belongingness, which are constituted by her biological self.

*Mr. Volk*: You asked her.

*Mr. Esper*: We accept it.

Q. We accept this posture as Erik Erikson's; the view that women are people oriented. Wouldn't woman's unique nature — shouldn't that be represented in all professions?

A. I think so. I think that the major thing we have overlooked in the past fifty years or thirty years with women, is that women can be brought into different jobs. But the jobs must change. The way a woman doctor is a doctor must be recognized as being different, an alternative possibility, to how a man would be a doctor. When we deny the fact that sex can contribute to a person's potential in any

profession, I think we are cutting off a tremendous right, a possibility for human achievement. I think there is room for women psychologists and men psychologists — there's no such thing as just a psychologist as far as psychological reality goes.

Q. Is there any body of experimental evidence that helps support Erikson's conclusions?

A. There are some empirical and experimental studies — my own study had as a basis this concept that women are different, and this difference is related to this uniqueness as a female. This hypothesis supported my own experience and my own research. I found that women were different and their differences did belong along the lines—

Q. The differences in what?

A. The differences in women could be accounted for and talked about under these dimensions.

Q. Is the Pittsburgh Press one of your industrial clients?

A. They are right now. But they are not an industrial client, no. We do no consulting for them, to my knowledge.

*Mr. Esper*: Well, if the Board please, if I could just reserve the right to call Mrs. Peters at a later point in time—I have no further questions.

*Mr. Volk*: I have one, sir, rather remote question. Who is Dora Capwell?

A. Dr. Capwell is the founder of our organization. She died last November. She founded the company in 1945.

Q. Till her death, what was her role in this organization?

A. She was the director.

Q. And what was her sex.

A. Female.

*Mr. Volk*: Unless there are any questions from the Board, that concludes our case.

*By Mrs. Reizenstein*:

Q. Mrs. Peters, in your study, I gather based on your experience, seventy percent, you said, of the women had certain preferences. Is that correct?

A. This is from my research that I did—library research—on the basic job. Right.

Q. Well you indicate then that possibly thirty percent of women would have preferences usually thought of as, say, male preferences?

A. I think so, yes.

Q. Would you think that these statistics would be true of other countries, such as Norway, Sweden, Russia? Probably not?

A. Mrs. Reizenstein, I haven't looked at that at all. But from my point of view, I suspect there would be.

Q. Are you aware of the studies that were done, before we had any Fair Employment Practice Laws, that indicated that Blacks preferred certain kinds of work? They used to say, you know, he would be happier doing this he prefers to be a teacher or a preacher — would you say there was any validity to that?

A. I never read any studies that had any evidence, any experimentally derived data, that this was the case. The evidence that I quoted about women has been found from woman herself.

Q. There has been testimony given involving fair employment practice laws in which experts came in

indicating this. Would you say that the fair employment practice laws really help to change the concept of the ability, the preferences, the capabilities of people regardless of race, color, religion?

A. I do not know.

Q. Would you agree that our job as members of the Commission administering fair employment practice laws is to give everybody free choice in job preference?

A. Yes, I think so.

Q. And would you approve of this right?

A. Yes.

Q. And would you say that no one—an employer, an employment agency or a newspaper—ought to do anything that would be contrary to this basic civil rights law?

A. I think that the civil rights law are a positive step toward social change, and I agree that everything must be done to give women who so desire the opportunity to achieve meaningful employment in these fields. I think, however, that there is a certain percentage—the case of the Press—I don't think I would represent the Press if I felt that they were doing anything that was in any sense discriminatory on this level. There is a legitimate body of women who sincerely and meaningfully have said they are interested in certain fields. To not allow them to be, is a certain form of discrimination. And I think that this always has to be kept in mind, that when a woman is told that because she is a woman is wrong, then she is being degraded and told that she has to be a man to be good at her job. And this is kind of a slap in the face to mothers and teachers

and nurses and all those women who do tremendous volunteer work for the joy of it because they are women.

Q. Would it be degrading if I were a feminist and I looked in the Pittsburgh Press and saw, you know, a category "chemist wanted"? Would it be degrading if they didn't say this was a female or a male preference?

A. I think, Mrs. Reizenstein, if I had gone as far as it took to be a chemist I would not feel discriminated against if I saw it that way. Maybe if I started and quit somewhere along the line and regretted my decision and wanted to get back into it, then I might say it was discrimination. But I have never felt that seeing Psychologist listed under male interest—it never bothered me one bit. I would certainly go and apply.

Q. That may be true of you personally and I am sure it was true of many Blacks who rose without the protection of the law. And I am saying that the law is to protect those who are less strong than you are probably as a human being. Do you believe that there is discrimination against women in employment? Has your experience given you any indication that there is any?

A. I know salaries are quite discriminatory.

*By Reverend Johnson:*

Q. I would like to ask a question concerning conditioning of the mind. Are you saying that you do not feel that advertising produces and ought to condition a person to think along a certain line?

A. I think it can. Definitely. I don't think any one factor is any more important than any other. For ex-

ample, we found one difference between women who work and women who don't work is the fact that their mothers work. It didn't matter whether the mother was a cleaning woman or a Ph.D.; the fact of her working had a lot to do with whether the woman worked. There's a much more permeating strong influence in just being with someone who has a profession, even a neighbor, that is female interest. It is going to be very complicated, I think conditioning.

Q. Mrs. Reizenstein asked a question about whether or not the law, in changing the law, or thinking along certain directions of change. And I think you answered that changing the law by the sex amendment might cause women to start thinking along different lines, perhaps in seeking a profession? Or do you feel that this is something physiological that will not happen?

A. I think that changing the law along sex lines has more specified interests. I think that changing job interests should be handled with care to prevent a violent uprooting of human potential. I think that when attempts are made to deny the possibilities of people being what they are in order to achieve social change, we are getting into an area where we might be going backwards. I am entirely convinced that the emphasis on sexual difference might not be made even greater in order to achieve the maximum amount of social change. And, as I said before, I am not entirely convinced that being masculine is the answer to the problems of society. I think being feminine has a lot to do with it. But I think that trying to negate the difference between the sexes might

not achieve the best result, and that legislation in this area should be done indiscriminately.

Q. You put emphasis on feminity. You talked about the old femininity and the new femininity, would you mind repeating it please, with emphasis?

A. I think in line with the new humanistic psychology, the new feminism says to the woman: be what you are, maximize your potential as such. If you have the gift to give it and to commit yourself to people more, this is needed because you can give it. You can give it more than men can give it. So maximize it. Our society is not a giving society anymore. It could be because masculinity is prized, I don't know. But certainly changes have been effected very rapidly in the way its being going along.

Q. Do you feel that this is wrong as against the old feminism?

A. I think the old feminism didn't do much good for the country. As soon as women got the vote they started prohibition, and a lot of other changes that —they didn't maximize what they could be. I think they just tried to assume a role that someone else had already taken.

*Mr. Valadez*: If it pleases the Commission we would like to move for adjournment until February 26th, at which time we will present the rebuttal witnesses.

*Reverend Johnson*: What day?

*Mr. Valadez*: Thursday, February 26.

*Mr. Volk*: We have nothing further. Of course we don't know what they will put on. I would hate

to get into rebuttal of their rebuttal. As far as I am concerned the hearing could conclude right now. But I wouldn't object to a continuance.

(A ten minute recess was had)

*The Chair*: Will you please come to order. The complainant requested, I believe, until the February 26th court, for presentation of rebuttal and then they can understand it is agreeable to the counsel for the respondent and agreeable to the Commission. It was originally intended to have the amicus curiae present their briefs at the end of the case. However, we have been requested by two of the amicus curiae to have the opportunity to present their briefs and their brief—and I underline brief—oral arguments now. So the first oral argument will be made on behalf of the Pennsylvania Human Relations Commission. I believe Mr. Andrew Winikoff, Assistant Attorney General of the Commonwealth and General Counsel of the Commission will make the brief presentation.

*Mr. Winikoff*: Thank you, Mr. Chairman. The Pennsylvania Human Relations Commission has been involved in newspaper advertising for a number of years. The jurisdiction of this commission over newspaper advertising dates back to its inception as the Fair Employment Practice Commission in 1956. From that time our jurisdiction to regulate the wording of newspaper advertisements has been unquestioned, until recent events led us into some conflicting relations with the Pennsylvania and American Newspaper Publishers Association.

Nevertheless, under Pennsylvania law, it is clear that an employer who places and ad in a "help wanted-male" column has expressed a preference for males only. If that preference is not based upon a bona fide occupational qualification, which may only be given by the Pennsylvania Commission, then that's the expression of an illegal preference and a violation of Section 5 of the Pennsylvania Human Relations Act. Anyone who aids and abets the employer when he places that preference is equally as guilty as an aider and abetter under Section 5E of the Pennsylvania Act.

I think its clear beyond question that the contractual relationship between the Press and any of its advertisers is aiding and abetting in the clear and commonsense definition of the word. Therefore, under Pennsylvania Law, there can be little question that the Pittsburgh Press is guilty of an unlawful discriminatory practice.

When we get down to the Pittsburgh ordinance, which is quite similar to Pennsylvania Law — the coverage is almost identical—there can be no question, there, that the Pittsburgh Press is guilty of an unlawful employment practice as defined in Section 8 of the city ordinance.

Its interesting to note that the U. S. Dept. of Labor held hearings in August of 1969 to determine the style and content of regulations to be issued by the Office of Federal Contract Compliance. Among the testimony given during that hearing was a memorandum from a staff member of "Newsday", which is an extremely large newspaper located on

Long Island in the state of New York. Their research analyst, Donald Gross (and this is noted on page 5 of my brief), noted that they had no trouble whatsoever switching to a single column system, and indeed their lineage had increased 25.6% in the year after the institution of the single column system. I think therefore, that the experience of "Newsday", the "New York Times", and other New York City newspapers, which stated that they had no difficulty whatsoever with the initiation of the single column system, would indicate that the Pittsburgh Press should have equally as little difficulty with switching over to the one column system.

There has been a great deal of testimony on the effect of the want ads on the job preferences of women. I think its interesting to note here that in 1966 the Federal Equal Employment Opportunity Commission did a very extensive survey on the economic status of women and minority groups. This survey called "Job Patterns for Minorities and Women in Private Industry" is a three-volume study. It makes several conclusions, one of which is that women are overly represented in low-paying and low-status positions, and underrepresented in professional, managerial and executive positions. Part of this, I think, is due to the stereotypes that women conceive of, and that men have, when they place want ads. Part of it I think is due to the want ads themselves because the expectations of women are directly based upon those want ads. A woman looking for a job will obviously go to that job for which women are hired.

The placing of a want ad in the men's column is an example of a preference for men, and there is an implied statement therein that women will not be hired. I think that if this Commission is to take a step forward in fighting to end the inferior economic status of women, they must indeed find the Press guilty of an unlawful employment practice as defined in Ordinance Number 75. Thank you.

*Mrs. Picker*: My name is Jane Picker and I am here as an amicus for the Complainant in this case on behalf of the Women's Equity Action League with headquarters in Cleveland, with members in the State of Pennsylvania and also in the City of Pittsburgh, and also on behalf of the National Association of Women Lawyers.

I really only want to say a couple of things. The first thing that I want to say is that while I have appreciated the testimony, our position is that the headings, per se, violate the ordinance, and it is not relevant whether or not any actual fact of discrimination has occurred against any particular person who has read this newspaper or not.

Secondly, I want to say that we believe that, in view of the fact that the headings violate the ordinance, a newspaper using such headings is, in turn, in violation as an aider and participator in this action, because as we understand it the newspaper selects the headings for the advertising columns and, in turn, from a legal point of view, may accept or refuse any advertisement that is offered. There is no obligation on the part of a newspaper to accept an advertisement from you, or me, or anyone

else. And in view of the fact that the newspaper has discretion both with respect to choosing the heading of the classified ad columns, and of choosing or not choosing to publish a particular ad, that it must accept responsibility for any injurious results coming from this.

The Press and amicus for the respondent have alleged in their brief that they should not be liable, regardless of whether discrimination occurs or does not occur, on the basis of the analogy of false advertising. False advertising is—in the State of Pennsylvania—a statutory offense and, as is common in many states, the statute relieves newspapers and magazines from any liability for false advertising. The brief of the respondent's amicus cites various cases in the field of false advertising to indicate that newspapers are never held liable for any injuries that occur in such a situation. We wish to reject this analogy. We feel that the proper analogy is not in the field of false advertising, but in the field of defamatory advertising. And perhaps if I may give one example it would be the classical example that is used in this field of an advertisement that is offered to a newspaper and accepted by a newspaper, that is completely innocent on its face—for example, that a death notice of a particular individual. And by happenstance, through a mistake, or what have you, this ad by mistake is not put under a column that is labelled "death notices", but is put under a column perhaps labelled "public amusements". This kind of situation is liable per se, and in the State of Pennsylvania, as in most states, a newspaper can be held liable.

Libel is an offense for which both the advertiser and the newspaper are jointly or severally liable, and there are cases in the State of Pennsylvania where an ad that is completely innocent has been held libelous.

I'd like to mention two cases to you and that will conclude my presentation. The first case is a case that arose in Pennsylvania where a newspaper advertiser published an ad saying: come into my shop and bring me a roll of film to develop and I will give you a free roll of film in exchange. The day after this advertisement was published, a competitor of this first advertiser placed an advertisement in the same newspaper. This advertisement, which did not mention the name of the first advertiser in any way, simply said: we do not lower the price of our film processing; we do not present blurred pictures; we do not use inferior chemicals in order basically to provide you with a cheaper service than others. And although this ad appeared in a subsequent edition of the paper it was held libelous. Now we contend that misplacing ads within help wanted columns is virtually the same situation. If an individual does not have an exemption from this Commission for sexually segregated employment then the ad is wrongly placed. We feel this should be considered the proper way of looking at this case.

The other brief point I wish to address myself to, and one other case which is a local case, involves the defense of the respondent that freedom of the press should prohibit a regulation in this particular

area. About five years ago there was a case here in Pittsburgh of a city directory publishing company which puts out a monthly—well something like Pittsburgh Travel Service Magazine. The city had been taxing this particular monthly bulletin for some years. The question involved here was: why was it being taxed when other newspapers were not? It turned out that it hinged on the fact that this particular publisher did not in fact publish his own magazine—it was published elsewhere. He owned no publishing facilities of any kind and an exemption was provided from the tax for manufacturing establishments, and all other publishers qualified for this manufacturing exemption, which he did not. Now since this argument failed him in his effort to fight off city hall, so to speak, he turned to the constitutional argument that freedom of the press should not allow him to be put in this kind of a situation. I would just like to read to you a couple of sentences which the president of the supreme court of Pennsylvania said in this case: freedom of the press may not be converted into license to escape commercial regulations affecting persons engaged in a normal, ordinary business pursuit, such as a vendor of wares and merchandise, including pamphlets, booklets, and printed directories. It is our view that if freedom of the press may not be used to escape commercial regulations assuredly it should not be considered an adequate excuse for violation of federal and state social policy prohibiting discrimination on the basis of sex. Thank you.

*Mr. Albright*: Mr. Chairman, for the purpose of clarification may I ask you one question, and that is what she would have this Commission do with an advertisement placed by an employer with less than five people, and also with an advertisement placed by an out-of-state employer?

*Mrs. Picker*: What I would propose would be the following. I would propose that if the Press wished to maintain its present situation of having three separate columns, that this would be perfectly permissible provided it was stated—it was understood — that the notices in the male and female columns were restricted to advertisers who had received bona fide occupational exemptions from the Commission, and that the public would be advised of this one way or another. Now, if in fact this were done honestly there would be, at this time, apparently few or no ads in two of these three columns. If, in fact, exemptions were given by the Commission, we would be very happy to see these advertisements continued in the separate male and female columns and we feel that the present notice to job seekers which is published could be changed only slightly in order to indicate to the public what the situation is. As it now reads it makes it very clear to the public that there is no correlation whatsoever between bona fide occupational exemptions and the classified headings.

While I was here last time I went through the January 16 classified section and I found twenty-two different types of work in the classified ads on that day — which was not very many, since it was Friday — and these twenty-two different types of

work were advertised in two or more columns. In one type of work it was actually advertised in three columns. So that, basically, the notice to job seekers tells you that this system is not for the convenience of the reader because you've got to go through all three different areas.

We feel that the present system — we have no objection to having the type of a system that others have proposed based on agency ads or different types of work — but we also have no objection to continuing the present system provided the sexually segregated ads were restricted to bona fide occupational exemptions.

*Mr. Albright*: That is the amicus's position that separated classifications can still be maintained regardless of the outcome of this hearing?

*Mrs. Picker*: It is our position that you can maintain a separate column for something — which I would not call a sexually segregated one, but for BFOE's as we would refer to them. This does not strike us as discrimination because it is not separate on the basis of separate treatment for the sexes; its separate on the basis of a particular occupation. In other words, if you had light work and heavy work; this is two different kinds of work.

*The Chair*: Thank you .This hearing stands adjourned until February 26.

## Hearing of February 26, 1970

NATIONAL ORGANIZATION FOR WOMEN

VERSUS

THE PITTSBURGH PRESS

FEBRUARY 26, 1970

*The Chair*: I think this is now the complainant's turn, right?

*Mr. Valadez*: Yes, Sir, Mr. Chairman.

*Mr. Esper*: May we proceed?

*The Chair*: Go right ahead.

*Mr. Esper*: Dr. Sandra Bem, please.

*The Chair*: Were you sworn before?

*Mr. Esper*: Yes. Dr. Bem has been sworn at this trial.

*Dr. Bem*: Before we start, can I ask Mr. Korsak one question?

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Dr. Bem, duly sworn, testified as follows:

DIRECT EXAMINATION OF DR. SANDRA BEM

*By Mr. Esper*:

Q. Dr. Bem, you had testified at an earlier date at this hearing?

A. Yes, I have.

Q. You have been sworn?

A. Yes.

Q. You were here when Jeanne Peters had testified, is that correct?

A. Yes, I was.

Q. All right. Now Dr. Peters claimed, Dr. Bem, that there are psychological differences between the sexes which are rooted in biology. Would you care to comment on that?

A. Yes, I would. As Dr. Peters herself pointed out, much of her theory, many of her statements, were based on a theory by Erik Erikson. I'd like to review that very briefly here . . . . .

Q. Please do.

A. To remind the commissioners. Erik Erikson's theory basically holds that because women are born with an inner space that that their inner space permeates every aspect of their existence, every phase of their life, and that they are therefore more nurturant than men. That because men are born with a penis, that that permeates every aspect of their being, they therefore are more aggressive, more assertive, more thrusting forth into the environment, if you will. He basically agrees with Freud, and I'll quote Erikson here that "Anatomy is destiny." One's psychological role in life is determined by one's anatomical characteristics. This is a quote from Erikson's "Anatomy is Destiny". Now, as Dr. Peters herself put it, because of this "Anatomy is Destiny" theory, one cannot be just a psychologist, for example, one must be a woman psychologist — the fact that inner space permeates your entire existence. Now this is a lovely theory. The difficulty with it, however, is that it is only theory. As Dr. Peters herself testified, there is virtually no direct experimental evidence for this theory. It is basically theory only, and not at all validated.

I'd like to comment on why this theory has not been validated. The reason is that it is virtually impossible ever to tell whether or not a particular outcome that you find, a particular difference between the sexes, is due to heredity, to biology, or to environment. Biology and environment are always totally mixed together in producing any particular outcome, and it isn't possible to separate them, to know how much of the result is the result of biology, how much of environment.

In the one study, for example, which Erikson himself cites, the *only* study in support of his theory, a study which looked at boys and girls and how they build blocks and how they arrange toy furniture, what kinds of configurations they produce out of these kinds of toys, he used subjects who were eleven and twelve year old American children. Now it is clear that by the time a child is eleven or twelve years old, both biology and environment have merged to produce whatever outcome we find, and it is impossible experimentally to separate the effects of environment. So Erikson's theory remains precisely that—a theory without backing.

There is, however, as I mentioned last time, some evidence which contradicts Erikson's theory. I'll review it only briefly, and that's the anthropological data, the crosscultural data which I introduced last time. Even though it is true, as Dr. Peter's said, that there is no society without sex differences—that's true—it is also true that the nature of the differences between the sexes varies from culture to culture. Men and women do not al-

ways behave in accordance with Erikson's theory, and there are some cultures, as I mentioned last time, where just the reverse of what Erikson would predict is found. That is, where the men are nurturant and where the women are aggressive. So Erikson's theory is not supported by these kinds of data. Let me make an over-all statement about this point, at this point in time. The fact is, I think, that psychologists simply do not know whether there are psychological differences between the sexes which are rooted in biology. And until a society raises boys and girls with equal opportunity to choose roles for themselves without being conditioned into a stereotype of what is appropriate for a boy or for a girl, it will simply be impossible to separate the effects of biology from the effects of cultural conditioning. Finally, it's amusing to me that the Pittsburgh Press should try to enlist Erik Erikson on the side of sex-segregated want-ads. For Dr. Erikson has said in print that he feels women should be represented in all of the professions, even in those professions which are considered typically masculine. Dr. Erikson considers its critical that woman's nurturance be represented in every occupation. He does believe that women are more nurturant than men, and he would very much, for example, like to see a woman as president of the United States. It is his opinion that if we could have a woman president, we would have fewer wars. Even if you start out with a biological base, taking the position that women are more nurturant than men, you still come to the logical conclusion that certain occupations should

not be reserved for women and other occupations reserved for men.

Q. Now, Dr. Bem, over and over the question has arisen about whether or not there was a valid analogy to be drawn between sex differences and ethnic relations. Could you comment on that, please?

A. Yes, I think there's a definite analogy to be drawn between racial differences and sex differences. Let me make several points in this regard. First, Dr. Peters testified that there are many studies of sex differences in the psychological literature. And that's certainly true, that is a fact, I would not deny it. But similarly there are hundreds of studies in the literature on the subject of racial differences. In one review article alone, covering only a six-year period from 1959 to 1965, we find 350 references to racial differences—that's in one article alone. So again, there is as much study on racial differences in the psychological literature as there is on sexual differences.

Second, when questioned about the analogy between sex differences and racial differences, Dr. Peters suggested that the differences between the sexes were biological, and she cited evidence in tone perception and other physiological characteristics as evidence for this point. But when asked about racial differences, Dr. Peters said that to her knowledge there were no comparable differences between the races. Dr. Peters is simply wrong on this point. Let me illustrate with just a few examples out of the hundreds of differences which have been found between blacks and whites. We know, for example, that blacks are less likely than whites to be color

blind. We know that blacks are more likely than whites to have 20/20 vision. We know that blacks have a higher galvanic skin response than whites. We know that blacks are more susceptible to sickle-cell anemia than whites. We know that blacks are less susceptible to phenylketomuria than whites. These are all clearly biological differences, and I think fifteen years ago, a commission of this sort might well have heard arguments that because of these biological differences between the races, blacks are more suited for certain kinds of jobs than others. Many of us can recall, I think, the argument that difference in skin pigmentation makes blacks more suited for hard work under the hot sun—work like cotton picking for example, and no one . . .

*Mr. Volk*: May I object to this? I, what, she's testifying as an expert psychologist. When she's qualified as an expert in testimony before civil rights agencies fifteen years ago, then I will no longer object to her opinionating. But she's now opinionating as to what might have been testified before such a commission as this fifteen years ago. This girl's not qualified to make such a statement. I'm not even sure she's qualified as a psychologist, let alone as a lawyer, and certainly not as a civil rights expert. I'd like her to stick to her subject.

*Mr. Esper*: If the Commission please, I think that this answer is responsive to the question. Also the question is one that is definitely proper rebuttal, because Dr. Peters had made certain statements that there is little if any differences between racial and sex differences.

*Mr. Volk*: If she wants to talk about racial differences, if she wants to tell us about the results of studies on racial differences between whites, blacks, and yellows, or whatever other races there are, since we've got to call them by colors now — green, red, black, yellow — if she wants to make this kind of testimony, that's O.K. with me, that's good psychological hard-core data. If she wants to talk about cotton-picking in the hot sun fifteen years ago, she's gotten away from her field and is obviously trying, attempting, to incite the racial sympathies of this board. Nobody brought up cotton picking in the hot sun. This is a racial affect.

*Mr. Esper*: The words "cotton picking", if the Commission pleases, is only brought up incidentally because of the skin pigmentation.

*Mr. Volk*: It is brought up as to her opinion as to what might have been argued before this Commission fifteen years ago. This is improper testimony, even under the liberal rules of evidence of a board such as this.

*Mr. Esper*: Well, I think Dr. Bem is qualified to testify to this point.

*Mr. Volk*: Dr. Bem was a baby fifteen years ago. She wasn't even around in any meaningful manner.

*Mr. Esper*: ? ?

*Mr. Volk*: Some of us do; some of us don't.

*Dr. Bem*: Is appropriate for me to make one comment here? It's just that . . .

*Mr. Volk*: Not as far as I'm concerned, it isn't.

*Mr. Esper*: Dr. Bem, we have to get the ruling from the Commission.

*The Chair*: I hope we can. As to the specific reference as to what could have been argued fifteen years ago, we will sustain your objection because we as a body, having experience, can take judicial notice of what we know. As to biological differences, I take it you would not object.

*Mr. Volk*: No Sir, that's proper evidence.

*The Chair*: As to what could have been fifteen years ago as to the distinction between the job opportunities, we have enough evidence (not in this case), but we have close judicial knowledge of arguments that we do and because of this we would sustain and ask the witness to proceed.

Q. Well, Dr. Bem, then, subject to that restriction, will you continue your testimony?

A. Yes. The primary point I am attempting to make is still present, and that is that, just as Dr. Peters pointed out, certain biological differences between the sexes, so there are clear-cut biological differences between the races, several of which I have just listed previously. Let me go on to a third point. Dr. Peters cited evidence to the effect that there are differences in job preferences between men and women, but she denied knowledge of any such diffrences between the races. Once again, a review of the literature indicates that Dr. Peters is in error. Racial differences have been found on the kinds of vocational interest tests that Dr. Peters, it appears,

uses in her own work, The Strong Vocational Interest Blank, for example. And in a 1968 review of racial differences in America, it was found that blacks are more likely than whites to prefer blue-collar and military jobs. In other words, there are differences in job preferences between the races, just as there are such differences between the sexes.

A fourth point: Dr. Peters points out that certain jobs, like nursing and teaching, were filled predominantly by women in 1900, and that they continue to be filled by women today. She concluded that women must have biological tendencies in those directions and if women had strong motivation to seek out other positions, they would have done so by now. But similarly, many jobs in our society have been filled predominantly . . . many jobs which were filled predominantly by blacks today, and I think that there are other than biological arguments to be raised as explanation in each case.

Finally, even though psychological differences in job preference, for example, have been found between the sexes, just as they have been found between the races, it is impossible to know for sure to what extent these differences are caused by biology, and to what extent these differences are caused by cultural conditioning. The two always interact, and in any adult, any time you see a difference between two groups — racial groups, sexual groups, or other groups — it is virtually impossible to tell experimentally whether those differences are caused by cultural conditioning, or whether those differences are caused by biology. That's equally true in the

case of racial differences as it is in the case of sexual differences.

Q. Now, Dr. Bem, what then is the relevance to this hearing, or to social policy in general, of the kinds of differences which do seem to exist between the sexes?

A. Finally, I find myself in a position where I have to agree with Mr. Volk. I think that the argument about racial differences is totally irrelevant to this hearing. Let me go back to a point I made in my earlier testimony. Any time you find a difference between two groups, whether that be in height and physical strength, whether that be in nurturance, no matter what it is in, it is always an average group difference. It says there is a mean difference between the two groups, but you will always have overlap between groups. As I said earlier, even though men on the average are taller than women, you will always find tall women; you will always find short men. Even if it turns out to be true, and we do not know it at this time, I'm not saying that I agree with this. Even if it turns out to be true that women are on the average more nurturant than men, there will always be nurturant men and unnurturant women. Even if it turns out that men are more aggressive than women, there will always be aggressive women and nonaggressive men. Even in Dr. Peters' own testimony, she stated that in her studies she has found that 30 percent of women show male job interest patterns. This is a substantial percentage of the population, and it cannot be ignored. It demonstrates my point once again — not all men and not all women are different. The differ-

ence only represents an average difference and is always overlaped between the two groups. But the argument about sexual differences and racial differences is irrelevant for still another reason. I think we're all aware of the fact that America believes in. . .

*Mr. Volk*: I'm going to object to legal conclusions of the witness. The witness is on here to testify as an expert psychologist as to fact, not to her belief of what America believes in. I think we have had enough speechmaking by diverse people supposedly called as witnesses to testify as to facts.

*The Chair*: As to the American belief, we will sustain your objection if you have some data. . .

*Mr. Volk*: I would not object to data.

*Witness*: Let me start over. The differences between the sexes and the differences between the races, I think, are irrelevant for still another reason. If we were to found any policy upon the principle that there are no differences between groups, we would be in a sorry state. Let's take a very important behavioral difference, like intelligence — something that's critical to the world of work. I think you'll all agree we discover that there are differences between groups. We know, for example, that on intelligence tests, orientals tend to outscore whites, Indians tend to outscore blacks, and Jews tend to outscore Christians. This appears over and over again. The question I would raise is simply "if this difference may now be due to cultural factors, it may be due to a fault of the test." We don't know, but the possibility remains, and there's con-

troversy raging about this in psychology—that it may also be due to biology. The question that I would ask is simply that "if it turns out that the differences between groups are biological, where does that leave us on the question of whether groups should be treated differently?" All I'm attempting to say is that even if biological differences between groups turn out to exist, in something like intelligence, for example, will we be led to conclude that we ought to treat groups unequally on the basis of that biological difference? I think we can't wait around to see if there are no differences between groups before we commit ourselves to a position of equal treatment for all groups.

Q. During the last hearing, Dr. Bem, Dr. Peters expresed the opinion that sex-segregated want ads in and of themselves have no effect on job preferences. In your earlier testimony, you began to describe a study which would bear on this point. Has that study been validated statistically?

A. Yes, it has.

Q. Would you describe it?

A. Yes. This is a study done specifically to ask the question whether or not sex-segregated want-ads, themselves, discourage female job seekers from being interested in or applying for jobs listed in the "Male Interest" column. In the study there were 52 women attending Carnegie-Mellon University. They were asked to rate each of 32 jobs which had been advertised in Sunday editions of the *Pittsburgh Press*. Sixteen of the ads had been drawn from the "Male Interest" column and sixteen had been drawn from the "Female Interest" column. Each woman

was given a booklet containing all 32 ads. She was asked to read each ad in her booklet and to rate it on the following scale: She was to give it a +3 if "you would be definitely willing to apply for the job"; a +2 if "you would be quite willing to apply for the job"; a +1 if "you would be somewhat willing to apply for the job"; a —1 if "you would be somewhat unwilling to apply for the job"; a —2 if "you would be quite unwilling to apply for the job"; and a —3 if "you would be definitely unwilling to apply for the job." The women were told to assume that they had the necesary prerequisite for each job: "We are only interested in your preferences, not your skills." In other words, there were 32 ads in all, and the women were to rate all the ads.

There were two major conditions to this study. One set of booklets showed the ads in sex-segregated format; the other set of booklets showed the ads in integrated format. Let me describe those conditions.

First the sex-segregated condition. Half of the booklets listed the ads in a sex-segregated format identical to that used by *The Pittsburgh Press*. The 16 male jobs were listed in alphabetical order in a column labeled "Jobs—Male Interest." The 16 female jobs were listed in alphabetical order in a column labeled "Jobs—Female Interest." Half listed the male jobs first and half listed the female jobs first. In addition, the following disclaimer, quoted verbatim from *The Pittsburgh Press*, appeared on every page of the booklet, and I quote:

"Notice to job seekers:

"Jobs are arranged under Male and Female

Classifications for the convenience of our readers. This is done because most jobs generally appeal more to persons of one sex than the other.

Various laws and ordinances—local, state, and federal — prohibit discrimination in employment because of sex unless sex is a bona fide occupational requirement. Unless the advertisement itself specifies one sex or the other, job seekers should assume that the advertiser will consider applicants of either sex in compliance with the laws against discrimination."

That was the sex-segregated format. We attempted to duplicate in every way the procedures used by *The Pittsburgh Press.*

The other condition was integrated want ads. Half the booklets listed the identical 32 ads in alphabetical order and with no sex-labeling at all. The disclaimer again appeared on every other page of the booklet, but with its first paragraph deleted.

No one in the study, I should point out, was aware that there were two conditions going on. The women had simply been told that we were interested — taking a job interest survey; each woman assumed that all the booklets in the study were exactly like hers. So the women were unaware of the fact that some booklets were segregated and some booklets were integrated.

Let me describe the results. These results have been evaluated for statistical significance, by the way, to insure that they did not occur by chance.

They are significant at the .02 level of confidence by a chi-square test.

The results, then: Do sex-segregated want ads discourage women from seriously considering those jobs which *The Press* classifies as "Male Interest"? Our results show this to be the case. When jobs were segregated and labeled on the basis of sex, as they are in *The Press*, only 46% of the women in this study were as likely to apply for "Male Interest" jobs as for "Female Interest" jobs. In other words, a majority of the women did prefer "Female Interest" jobs in the sex-segregated format. But does this really reflect a true preference on the part of women for so-called "Female Interest" jobs? It does not. For when these same jobs appeared in an integrated alphabetical listing with no reference to sex, fully 81% of the women preferred the "Male Interest" jobs to the "Female Interest" jobs. So preferring "Female Interest" jobs seems to be an artifact of the sex labeling.

For example, the job of newspaper reporter fell in popularity from 7th most popular place when it appeared in the integrated listing to 19th place when it was segregated and labeled as a "Male Interest" job. It seems clear that any newspaper editor who wishes to hire only male reporters—in violation of the law—can place his ad in the "Male Interest" column, secure in the knowledge that this will effectively discourage many female applicants. It is in this way that sex-segregated want ads can "aid and abet" discrimination in employment on the basis of sex.

But what about actual job seekers? What can we infer from this study about the effects of sex-segregated want ads on actual job applicants? Can these results be generalized to the real job-seeking situation? It is my view that, if anything, this study probably underestimates the extent to which sex-segregated want ads discourage female applicants.

First, we required the women in our study to rate every ad regardless of how it was labeled. We suspect that many women never even bother to look at those ads which appear in the "Male Interest" column, and, indeed, several of the women in our study explicitly stated that it had never previously occurred to them to look for jobs in the "Male Interest" column.

Second, we asked the women only to indicate whether or not they would be willing to apply for each job. They did not, in fact, have to expose themselves to the risk of encountering discrimination by actually applying for "Male Interest" jobs. Clearly it is easier for a woman to say she will apply than it is for her to actually apply.

Third, in our study, the disclaimers occupied 13% of the available space in the booklet. This rendered them far more prominent than they would be in any full page of classified in a newspaper. (For example, even if *The Pittsburgh Press* published the disclaimer on every page of classified advertising, which it does not, it would still occupy less than 3% of the page.) In my opinion then, this study would seem to underestimate the extent to which sex-segregated want ads actually discourage

women job-seekers from applying for "Male Interest" jobs.

There is one final point about this study that I would like to make. You will recall that in an integrated setting, 80% of the women preferred "Male" jobs. What this says is that *The Pittsburgh Press'* method of separating jobs into male and female categories does not correspond to true preferences of women. It is worth pointing out that it does not correspond to Erikson's distinction between nurturant and aggressive jobs, and, in fact, as the amicus brief of the Women's Equity Action League reveals, there is a fairly sizeable overlap between the jobs in the "female" column. In fact, the only thing the *Press* categorization does seem to correspond to is employer preference. Based on Mr. Seli's own testimony, it seems to me that the columns would be more appropriately labeled "Employers Who Prefer a Male" and "Employers Who Prefer a Female", because the categorization does not correspond to any known or discussed preference difference between males and females themselves.

I have one final question to ask Dr. Bem. Dr. Peters made a distinction when she testified between the "old feminism" and the "new feminism". She claimed that "old feminists" wanted to be like men, that they were trying to create a unisex. She said that the "new feminism" doesn't believe that women can reach self-fulfillment by being like men. How do you see this question?

I'd like to respond to that briefly. But before I do, I would like to ask something of the Commissioners and that's I am the author . . . my husband and I

are the authors of a published paper on this question about "new feminism" and "old feminism" and on the cultural conditioning of the girl in our society. It would be much too lengthy to read here and, if appropriate, I would like to enter it into the record as testimony without actually reading the entire paper or to make it available to the Commissioners before I respond to this question.

*Mr. Volk*: In the opinion of counsel for the respondent, any paper that has been published in a recognized profesional journal is in the nature of law review articles or other authoritative documents which we believe should be admissible in the brief and referred to in the brief. So we wouldn't object to, if this thing has been published,

*Dr. Bem*: It has.

*Mr. Volk*: To its inclusion in Counsel's brief. I would suggest that, just suggest, that this be done as a matter of perhaps shortening the proceedings.

*Mr. Esper*: What do I understand the Commission to do? I have the article. I could identify it.

*Mr. Volk*: You could distribute it. I don't care what you do; it can be distributed if you wish.

*The Chair*: If you want to distribute it now, append it to your brief, whichever is your preference.

*Mr. Volk*: The problem with using articles such as this in their full-text context is that the hearing is going to get into rebuttal testimony on what's in there and these things could drag on forever.

*The Chair*: I would think that you would make reference to it in the brief and attach it.

*Mr. Volk*: We would probably have some similar documents we want to include in our brief, that's why I raised that question.

*Mr. Esper*: The only reason I think Dr. Bem wanted to introduce this at this time rather because of its length and she doesn't want to read it in. We would be happy to submit it as part of our brief. Appended to it. O.K., Dr. Bem, would you then.

A. Let me respond to the question briefly then — the distinction between the old feminists and the new feminists and where I stand. Basically at some level I am with Dr. Peters, but in my opinion she doesn't go far enough. Dr. Peters is very much opposed to the idea of unisex, that is, one role for everyone, regardless of whether they are male or female. And I too am totally opposed to this point of view. Never have I in my spoken or written statements ever used the word "unisex". I am not in favor of that. But Dr. Peters seems to be replacing one role for everyone regardless of sex with two roles depending on sex. I have the feeling that she is advocating a position of let's have nurturant females and aggressive males, two roles rather than one. I would not be willing to classify myself as an old or a new feminist, but, if you will, let me use a new word, *new humanism*. If there is a value that I hold above all else it is the value of individual integrity, that the individual is to be held above everything else. Just as I do not think there should be one set role for everyone, neither do I think that there should be two set

roles, only two kinds of people rather than one. I do not believe in role stereotyping. In other words, only two roles depending upon your sex.

If one truly believes in the integrity of the individual, he was created with individual choice, then it is inappropriate to set up stereotypes of what is appropriate behavior for males or females, or for blacks or whites, whether those stereotypes are based on Erickson's theory, on Peters' preferences, or on preferences of one sort or another. To the extent that you set up signposts which say "this role is for you by virtue of an accident of birth, like sex or race," then to that extent you are sacrificing the value of individual integrity and of freedom of choice for the individual, and it is to those values that I adhere. Therefore, I would put myself in a position called humanism rather than old or new feminism.

*Mr. Esper*: Cross examination:

CROSS EXAMINATION OF DR. SANDRA BEM

*By Mr. Volk*:

Q. Let's talk about your experiment. How many women did you say were involved in this?

A. Fifty-two.

Q. Fifty-two women. Where did you get these ladies?

A. They're students at Carnegie-Mellon University.

Q. In what school, what curriculum?

A. Fairly well divided among the Humanities and Social. I would say, I would think, predominately Humanities and Social Sciences Curricula.

Q. Predominately the Humanities and Social Sciences Curricula.

A. Some from the Engineering and Science Curricula.

Q. None?

A. Some.

Q. Some. How did you get them . . . how did you recruit them?

A. In Introductory Psychology, students are required to participate in psychological experiments. They are given experimental credit. In other words, each student is required to put in three hours of experiments—to attain three hours of experimental credit. A research assistant simply went to the Introductory Psychology class and asked for female volunteers to participate in an experiment. That's how.

Q. How many of them were members of the National Organization for Women?

A. I don't think there is any such chapter on the Carnegie-Mellon Campus, so I would expect none.

Q. None? I'm sure you intended to respond to the question, but didn't quite. Do you know how many, if any, were members of this organization?

A. No. but to my knowledge there is no organization . . . well . . . I am a member of NOW, and I have some knowledge about who belongs to NOW in the City of Pittsburgh. And to my knowledge, no student at Carnegie-Mellon belongs. In addition, there is no chapter of NOW on Carnegie-Mellon's campus, and as a result, I think that none are members of the National Organization for Women.

Q. Did you inform the students that the purpose of your study was to be used in this litigation?

A. Again, the students were informed that this was a job-interest survey. They had no knowledge of the fact that I was the one doing the study; they had no knowledge that the study was to be used for this kind of purpose, and they had no knowledge of the fact that this was an experiment. From the student's point of view, every booklet was identical to the one she was writing on. She was unaware of the fact that some of the booklets were integrated and some of the booklets were segregated. There was every attempt made to see to it that there was no biasing of the results in this experiment.

Q. As I understand the experiment, each girl got only one booklet.

A. Right.

Q. Some got the segregated booklet, some got . . .

A. Half got segregated, half got . . .

Q. Which would have made about 22 each, is that right?

A. Twenty-six.

Q. But there were 46 . . .

A. Fifty-two girls.

Q. Fifty-two, and so half of them got one booklet, and half got the other. That's not a very high cut in statistical sampling. How significant is the .02 level of confidence?

A. Psychologists require . . .

Q. Tell us the percentage, the odds of that happening much. That's normally the way we . . .

A. Two percent; that's what the .02 level means. Psychologists require, in order to count any result as valid, that your statistics demonstrate that they would have only occurred by chance at a 5% level

of probability. So .05 is the level of confidence typically required. We found .02 level of confidence; that's what the statistics indicated.

Q. And the odds are two out of a hundred that this could have occurred. These results in this experiment could have occurred by chance.

A. Right.

Q. Did you try a similar experiment with men?

A. We did not. Because we did this study primarily for the purposes of this hearing, it seemed to us that the question of real interest was whether or not female job applicants were discouraged. I would expect, but I did not conduct a study, similar results for men.

Q. You have said that you, personally, don't favor unisex. But you favor humanism. They are both popular words, I guess. I guess they both have meaning to the participants or they wouldn't use them. You don't believe in unisex. Do you believe in differences between sexes, is this correct? It isn't your personal desire to have everyone wearing . . . Rudi Guernrich's (however you pronounce his name) fashions with everybody wearing the same clothes? They're acting in the same manner at all times. This is not what you desire personally?

A. I am basically against . . . relatively unconcerned about the way people dress. I don't want everyone to dress alike anymore than I am willing to say that I want everyone to dress differently.

Q. I believe you said you encourage, or personally favor, differences between the sexes.

A. I said that at this point in psychology, it is not known whether or not there are any biological differences.

Q. You said that earlier in your testimony. I'm talking about later in your testimony, when you said that you personally did not favor unisex. I believe you used those words.

A. What I do favor, I said, is . . .

Q. *But* what I'm interested in now is what you *don't* favor; we'll get to what you *do* favor. And you *don't* favor unisex.

A. I do not favor one role for all people regardless of sex. That is appropriate, that's true.

Q. And you favor generalized variances between the sexes based on sex. You made that thing about that little difference.

A. Yes, I think whatever differences there are between the sexes are fine, great. I think that's why the human species has survived as long as it has, and I have no interest in doing away with it.

Q. But you have also said that culture—I believe you said — that culture impresses the differences between the sexes, that it reinforces roles within boys and girls, as they grow up, to produce . . .

A. Not that . . .

Q. To produce differences which are primarily sexually constant. Is that true?

A. What I said . . .

Q. Or is it only anatomical differences between the sexes?

*Mr. Esper*: Here, here. You asked a question!

*Mr. Volk*: Well she won't let me finish the question, so I have to interject.

A. I keep thinking you're finished. Are you finished?

Q. Yes, if you understood me.

A. I think I did. What I said is that there are sexual differences in all cultures; that is to say, that men and women do not behave exactly alike. There are some cultures in which they behave very similarly, but in most cultures men and women do behave differently. What those differences are differ from culture to culture, so it is not just a matter of culture taking certain biological differences and reinforcing them, but rather on top of whatever biological differences may exist, and we do not know what they are, the culture seems to pick some additional feature and decide to use that to accentuate the difference. They are not necessarily fundamentally sexual in nature.

Q. That's not responsive to my question. I'm trying to determine whether or not you favor cultural distinctions between the sexes in this culture; the one we happen to be mired in right here. Do you or don't you? I thought you said you favored sexual differences. I'm trying to determine that they must be cultural.

A. To the extent that those differences reflect real differences between the sexes and not some imposed myth about the differences between sexes, then certainly I have no objection to differences between the sexes of that sort.

Q. If you're going to have differences between the sexes, and you've admitted that no one grows up entirely free—I mean that all cultures have sex roles of some kind—then our culture is going to reinforce the differences between the sexes. It is going to establish them if they don't already exist biologically.

A. Not logically, no. If there aren't biological differences between the sexes, a culture need not establish them.

Q. I think that even NOW has concluded that there are certain anatomical differences between the sexes. I don't think they've gone quite that far. And I think you have concluded that there is no such thing as a sexless culture—every culture has sex roles and sex differences. I thought that you had testified that you favored this; that you were not in favor of unisex; that you are in favor of sexual differences, and that these differences must necessarily, therefore be at least partly cultural.

A. I do not see the only alternative to unisex as being sexual differences. It goes one step away from unisex in what I consider a positive direction; namely, it recognizes that all people are not exactly alike and that therefore one ought not to expect all people to fill exactly the same role. However, this seems to me only to be moving slightly farther away from, only slightly away from unisex, and the point it makes is that there are differences between people. And to the extent that the culture allows those differences between people to develop and to flourish and to thrive, then to that extent the culture has moved away from unisex. I don't think *two* roles is very far away from unisex. I'm just suggesting that to the extent that there are biological differences between the sexes, then fine. I think that they are responsible for the survival of our species, and I think that that's great. But to impose more differences on top of that biology seems to me not in keeping with the value of individual integrity and to be very close to the concept of unisex.

Q. You testified that this happens at a very early age within the home. Would you want us to stop raising little boys to be little boys and little girls to be little girls? To dress them all in yellow instead of pink and blue when they're babies. What is it you're really advocating? It seems to me that if you're going to . . . you're dressed, obviously dressed, as a woman, very attractively so. You're not wearing a caftan, or whatever it is that the designer who promotes unisex is trying to get us all to wear. You're wearing a very attractive dress. I assume your hair is one as a woman, even though that's getting harder and harder to tell apart these days. But yours is obviously feminine. I assume . . . we'll forget your family status. If you have children, are you going to raise them all in a sexless culture? Or do you intend to raise little boys as little boys and little girls as little girls? If you do that, are you not reinforcing the very stereotype that you come here to oppose?

A. You ask many questions. Let me respond to the one of how would I raise children, and what would be in my opinion ideal, the ideal for raising children. And once again, let me begin with my value of the integrity of the individual. You come very quickly to the goal that I would see as ideal. There are some biological differences between the sexes, and that's fine. Let's not do away with them, but let's not necessarily add thousands of additional differences which are not biological on top of them.

Q. We start adding them in the home . . .

A. I was just going to get to . . . What I would advocate doing with my children, although I certainly

would not suggest making a law that everyone must treat their children in this way.

Q. I assume that's next, but go ahead.

A. What I would see doing is simply treating each person as an individual. And if my daughter comes home from school all excited about a biology class, I will be as likely to encourage her to think of becoming a pyhsician as I would my son. It seems to me that while I will make no fuss whatever, and could not be less concerned, about seeing to it that they all dress alike, I see no reason for that, on the other hand—I see no reason for prescribing from birth the role that the girl or the boy is to play in life. We know, for example, that at this point of time the majority of America's married women are full-time homemakers. Now the interesting thing about this society, which claims to value individual integrity, is that it is predictable on the day of birth how a woman will be spending her time some 25 years later. I consider that a violation of the value of the individual integrity because it basically says that by virtue of an accident of birth (what sex you happen to be born), her life style, her role in life, has been completely determined. That violates my value of individual integrity.

Q. Your statistics that show that just because a majority of women want to be mothers and housewives doesn't indicate that the substantial minority isn't free to go off in some other direction. Unless you want to do some positive legislative act to stop the majority from freely choosing to be housewives. I don't know if that's what you advocate or not. I simply can't tell.

A. I'm simply stating a statistical fact, that most women . . .

Q. You seem to say it's bad.

A. No. I'm saying that most women, regardless of education, regardless of aspirations, regardless of motivations, regardless of almost anything that is true about them as unique individuals, end up in the role of full-time homemakers solely because of their sex. At no point do I say that the role of homemaker is superior, nor do I say that it is bad that a woman or a man should freely choose to be a homemaker. I'm only saying that if you believe in the value of individual integrity, then it is appropriate to leave all options open to children as they are growing up as to what role in life they will want to play.

Q. Dr. Bem, you've already testified, I believe, in your previous testimony, that these options begins to be closed at the date of birth of a child when he's brought home in a blue blanket instead of a pink blanket if he's a little boy. Now if these pressures continue through the pre-school years and the prepubescence years, in the home, in the school, in the culture, on television, in the newspapers, and other means than the want ads, until about the time that the child is in high school, his role has been to a large degree stereotyped in his own life. This has been impressed on him by outside culture. Now you haven't testified, as far as I'm concerned, that anything in your own style of childbearing that would stop reinforcing these cultural differences except that you said that you would encourage a child who wanted to be a biologist to be one. Now that's role counselling at the high school level. If you really be-

lieved what you have argued, I believe you would stop little girls from playing with dolls and force your little boys to play with dolls . . .

A. No, that does not follow. I am not interested in turning boys into girls or girls into boys. I am only interested in leaving the options open. What I would do, if my little boy played with dolls was not to tell him that it is a sissy thing to do, nor would I tell my girl, if she played with dolls, that that was a bad thing to do. I would simply allow children to be exposed to stimulation of various sorts, what would typically be called masculine and feminine, and let their individual interest patterns take over. You asked the question, what can we do about children, you know, is there any way to have them not fit perfectly into that role. Dr. Peters herself testified that the primary finding, which occurs over and over again, is that women who want to work tend to be raised by mothers who work, that simply having a role model of a working mother is a primary determinent in terms of little girls choosing a role that is different from traditional ones.

Q. Well I've also read, and I believe the studies will verify these, that many homosexuals tend to be raised in families without a male stereotype; that is, without a father, a male image. Is this true in the psychological literature of your. . . .?

A. I do know that psychological literature. That's a good question. In fact, the pattern of relationships between the parents of homosexuals is not quite as you have described it. Let me describe it for you. We tend to find several patterns. First of all, when there is both a mother and father present we tend to find

the mother who constantly demeans the husband, or we can find a father who is cold and rejecting of the children, particularly the sons, or we find a mother who is very seductive toward her sons, or we find a mother who is very smothering of her sons, who just totally devotes her love and attention to them. We do not necessarily find any evidence to the effect that if a — I forget exactly how you phrased your question — that simply having a mother and a . . .

Q. Just essentially I'm speaking of fathers, of course, without a male image.

A. The pattern is not one of simply a fatherless home, but rather, where a father exists, that the father be cold and rejecting of his sons. Notice that the kinds of change I am suggesting in roles would be less likely in my opinion to produce homosexuality, precisely because if we raised boys, in our culture, so, they would be able, without feeling unmasculine, to express warmth and gentleness and love and compassion to their sons, without feeling somehow unmasculine. The difficulty in the background of the homosexual seems primarily to be the father who is not able to show that kind of affection.

Q. Is there not a strong statistical incidence of homosexuality in the fatherless home?

A. I do not think that is the case.

Q. You do not think so?

A. No.

Q. Well I gather, as near as I can tell, that you are not opposing cultural destinations which lead to, tend to, pressure, or gently pressure, at least, as we think, into sexual selected roles.

*Hearing of February 26, 1970.*

A. As I said, I am opposed to any stereotyping which pushes people, by virtue of an accident of birth like race or sex, into roles purely on the basis of stereotyping.

Q. But any culture is going to, in a large degree, do this, isn't it? And this is going to express itself in tendencies toward job preferences between the sexes, isn't it?

A. Between the sexes, but between any other group as well. We also find that same pattern between the races.

Q. Let's talk about that for a little bit. We've talked about the biological differences between the races. I think we all know the more obvious biological differences between men and women manifest themselves, or a means at least, in certain physical qualities — strength, speech, what have you. I am not personally aware that the physical differences between the races so manifest themselves. Perhaps I am in error. Is there any statistically significant differences between the musculature of the black races?

A. There is a fascinating . . .

Q. And first, I think if we are talking about differences in races, we have to talk about pure races, since there are very few purely black people in America, I don't know how you could segregate that out and if you're talking about black races. What type of black races? You have the seven-foot high Massei and you have the four-foot pygmies in Africa — so there are obviously anatomical differences. I challenge your statement that there are significant physical differences between the races as we find them

in America today, and I ask you to reiterate how that can be.

A. There are studies done in America today, which indicate that despite the fact that there has been intermarriage between the races in America today, that despite that fact, nonetheless, on the average, by nine hours after birth black infants are more mature on physical kinds of dexterity tests than white infants — by nine hours after birth! That there . . .

Q. Does that continue to the job holding years?

A. Well, we do find, if you look around in the world at large, that blacks seem to have surprising athletic ability as compared to whites and it's unclear among expert psychologists as to why this is so. We find a disproportionate number of black basketball players, for example, and while I may agree with you that this may be simply environmental, the fact remains, here, as in the case with job preferences, psychologists do not know the answer to that question. By nine hours after bith, physical differences in terms of dexterity in something like athletic ability do appear between the races, whether or not that's whats showing up later is simply unknown at this point, so it may be biological . . .

Q. Take your differences as you listed them at the time and I don't know how many of them I jotted down; but sickle cell anemia is simply that. That's an illness that occurs in small instances in blacks, does it not? It only occurs in blacks, but is not an epidemic disease in anybody. It is a rare disease, is it not?

A. Well, tone threshold and that sort of thing. Dr. Peters mentioned it also . . .

Q. We're talking about sickle cell anemia. We'll talk about Dr. Peters on rebuttal. We're talking about my questions. Sickle cell anemia is a rare illness, is it not? Relatively rare.

A. Less rare in black than in whites, but . . .

Q. I don't think it ever occurs in whites, as a matter of fact, from my reading on the subject. I am asking you if it's a common illness. It is an illness, it is not a physical condition.

A. Well, it is a physical condition, yes, an illness is certainly a physical condition.

Q. It is a susceptibility of the black races to a given specific disease, is this not correct?

A. Right, and we find that blacks are more susceptible. That's the way I stated it: blacks are more susceptible to sickle cell anemia than whites. That's exactly as I stated it.

Q. Sickle cell anemia is hardly a criteria for what produces a difference between job preferences.

A. No, but there are some of the other distinctions I said. Like that blacks are more likely to have 20/20 vision, might well be, or that blacks are less likely to be color blind, might well have implications in terms of jobs.

Q. It certainly could. Airline pilots, train engineer . . .

A. And I suspect that . . .

Q. It would hardly be significant . . .

*Mr. Esper*: I think you should let her finish.

*Mr. Volk*: Well if I let her finish I'll never get the next question. Dr. Bem is a very voluble person and I think we have to let the Commission

determine when she's finishing an answer and when she's making another speech. The differences that you talked about in, vision, which while they may be statistically significant are slight at best, would hardly manifest themselves in the want ad pages of the newspaper.

A. It seems to me that psychology bases its conclusions on evidence which indicates statistical significance. Just as we find biological differences between the sexes which are statistically significant, so there are biological differences between the races which are statistically significant. In my opinion, no, I don't think it should show up on the sex segregated or race segregated pages of the classified ads. But the same thing follows that we're talking about — statistically significant differences between the sexes. The analogy still holds it seems to me.

Q. Mrs. Bem, referring back to your experiment now, do you know the exact percentage of these young ladies who were preparing themselves for a technical career?

A. I do not recall the exact percentages. I do know it was quite small, because most of the girls in the sample were humanities and social science majors, as I said. It may have been three or four.

Q. I asked you that because Dr. Peters testified that people who prepared themselves for a "male" career tend to be less influenced by where jobs appear in the newspapers than people who have prepared themselves for another career; or as one of our earlier witnesses for the complainant testified, who prepared herself to be librarian and now wants to

run something. It's not clear what she wants to run, but, she wants to run something.

A. I don't know of any actual data that says that women who are preparing themselves for technical careers are more likely to look in the "male interest" column, however.

Q. In this experiment, did you remove the other "attractive" variables such as salary?

A. No, we did not. However, we did attempt in picking jobs to match jobs from the male and female interest columns so that there would not be an inordinate difference. It is very difficult to arrive at female jobs that are equally attractive as those in the male category, but we did attempt to match them in terms of those kinds of, as you call them, attractive attributes.

Q. Dr. Peters tells me that girls at that age — college age — are highly motivated, and very, very susceptible to all forms of job attractions — romance in a job — as opposed to a job as a career, as a means of making a livelihood over the long haul. Did you make any effort to screen that variable in your experiment?

A. Well, if anything, it would work against us, if that's the case, because one of the jobs, for example, in the female interest column was stewardess. Now there is almost no job in our society whose public relations says as much that this is a glamorous job to be done in the meantime. That was on the list and it did not fare as well as some of the less romantic, less glamorous, male interest jobs. So if anything that should have biased our results against us.

Q. I have nothing further.

*Mrs. Reizenstein*: I was interested in Mr. Volk's question as to whether you made a study with a group of men. Do you believe that the want ads might discourage men from applying for jobs that are listed as a female preference.

*Dr. Bem*: I have one bit of data to cite in regard to that question. We did a pilot study at Churchill High School in which both males and females participated and one of the things that we found happening over and over again was high school males raising their hands and asking the question: "Do I really have to rate these female jobs? I mean, they're for females." And there was some resistance even to reading the jobs and rating them. So I think that yes, in fact, labeling a job "female" in our society also says to a male that this is a job that you really shouldn't be interested in — don't bother looking at it.

*The Chair*: Thank you very much.

*Mr. Esper*: Mrs. Anderson, please.

*Hearing of February 26, 1970.*

MRS. RUTH ANDERSON, witness for NOW, having been duly sworn, testified as follows:

DIRECT EXAMINATION OF RUTH ANDERSON

*By Mr. Esper:*

Q. Would you give your name and address?

A. Ruth Anderson, 813 Valley Street, Oakmont, Pa.

Q. Mrs. Anderson, what is your occupation?

A. Domestic.

Q. And as a domestic, have you had occasion to use the facilities of the want ads of The Pittsburgh Press?

A. I have.

Q. And would you tell us on what day and for what purpose?

A. Well, I'm always looking for more work. I was looking for more work at the time. It was January 20th.

Q. For what particular job, and in what column were you looking on January 20?

A. Well, the only thing that was available was dishwasher.

Q. And did you find an ad?

A. Yes, I did.

Q. And what happened when you responded to that ad?

A. Well, I called. I didn't get a definite time of appointment. He said I could have an appointment, but he didn't give me a definite time.

Q. When you said "he said," was this the proprietor, the man who placed the want ad?

A. Yes.

Q. And when you called a man answered?

A. It was a man that answered.

Q. And you tried to get an appointment?
A. Yes.
Q. And what do you recall?
A. He didn't give me a definite time for an appointment.
Q. What action did you take?
A. I went home, and was down talking to a cousin of mine. And he suggested that he call and see if he could get a definite time of appointment. And he called and did. For the both of us.
Q. This ad that you responded to, was that classified under jobs—male interest or under jobs—female interest?
A. Jobs—male interest. I didn't see any under jobs—female interest.
Q. You didn't see any dishwashing jobs under jobs-female interest?
A. No.
Q. Now, your cousin suggested — what was that he suggested to you?
A. That I go home—I had slacks on—he suggested that I go home and change my clothes and he'd call and see if he could get an appointment for the two of us. A definite time of appointment.
Q. The cousin you are referring to — is that a male or a female?
A. He's a male.
Q. And did you get an appointment?
A. Yes, we got an appointment for the two of us.
Q. And what, if anything, transpired when you went there to the place of employment for the appointment?
A. When we got there the man sort of said at first that the job was filled.

Q. Did you arrive there with your cousin?
A. Yes. The two of us was there.
Q. I see. And this man who talked with you said the job was filled? The job of dishwasher.
A. Yes, that's right.
Q. And then what happened?
A. My cousin and I looked at him awhile, and my cousin said it was because he was black that he didn't want to give him the job.
Q. Then what happened?
A. The man said—he was sort of flustered—he brought out this paper and showed me. And on this paper it said: if a woman applied for the job it was filled.
Q. What if a man applied for the job?
A. He didn't say anything about a man.
Q. In other words, he showed you this paper?
A. Yes.
Q. And this letter was his instructions that if a female applied for a dishwashing job he was to say to the female that the job was filled. Is that correct?
A. He just showed us the paper. He didn't do too much talking.
Q. You read the paper?
A. Yes, I read the paper myself.
Q. And this is what is said?
A. Yes.
Q. Did your cousin, or did you, get the job?
A. No. Because he called downstairs and a man came up. This man was wearing a white coat and he said he had the job.
Q. This man, I presume, was black. Is that right?
A. Yes.
Q. Then, I presume you left. Is that correct?

A. That's right. I left and went home.
Q. What, if anything, did you do after that?
A. Well, I called a friend and I was telling him about it and the friend called—next day. And the man said the job was open. Now, I don't know whether it was the same man but he said the job was open.
Q. Who was it who called, male or female?
A. It was a man.
Q. In other words, when you were at the place of employment they brought up a man in a white jacket who said the job was filled. Then the next day—were you present when this male called for the dishwashing job and they said it was open? Were you present?
A. No.
Q. Well, how do you know about it?
A. He told me.
Q. That the job was open?
A. Yes.
Q. Did he make an attempt to get the job?
A. I don't know. I didn't ask any more about it.

*Mr. Esper*: That's all we have.

*Mr. Volk*: I would like to ask that the testimony of this lady in court be stricken. We don't follow the strict rules of evidence in this type of proceeding, but I would like to point out that if this were a case against the restaurant where she applied, then her testimony would be relevant. But we are here to determine whether The Pittsburgh Press violates the ordinance in the City of Pittsburgh. This lady has testified that she has applied for a job as a dishwasher, which she found readily in the

newspaper, classified under jobs — male interest. When she went there, apparently they were going to discriminate against her because she was a woman. Now, we agree that some employers discriminate against women. What that has to do with The Pittsburgh Press is beyond me. And I ask that her testimony be stricken as being totally irrelevant to these proceedings—even though she may have a legitimate grievance before this Commission for discriminatory practice. Unless she can prove that restaurant is located down here on the Boulevard of the Allies in the Press Building, her testimony is irrelevant to these proceedings. I don't even know why this lady was brought in here.

*Mr. Esper*: Well, in answer to Mr. Volk, I think this testimony is relevant. Mr. Seli did testify in answer to a question about whether The Pittsburgh Press, in doing what it is doing as far as want ads, aids the employer who wants to discriminate. And this is proper testimony in showing that the want ads, by using the male interest column, has definitely discriminated on the basis of sex.

*Mr. Volk*: It doesn't show definitely anything. She hasn't proved a darn thing here today. The whole thing is irrelevant and to the extent that it may not be irrelevant, it is purposeless.

*The Chair*: I have one question. The job was placed in the male preference column?

*Witness*: That's right.

*The Chair*: We will note your objection, but we will accept the testimony for the record.

*Mr. Esper*: That is all.

*Mr. Volk*: I have no questions.

(A five-minute recess was had)

*The Chair*: Will you please come to order?

*Mr. Esper*: If the Commission please, I would like to call Wilma Heide, please.

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WILMA SCOTT HEIDE, witness for the complaint, and having been duly sworn, testified as follows:

DIRECT EXAMINATION OF WILMA SCOTT HEIDE

*By Mr. Esper*:

*Mr. Volk*: I would like to have a showing, I would like to request the Commission to ask for a showing, as to how Mrs. Heide's testimony is going to be proper rebuttal. I would like to point out that in our procedures we are now in a posture of rebutting evidence—that the complaint rebut the evidence presented by us. And Mrs. Heide, known to all of us as a member of the Pennsylvania Human Relations Commission, as an ex-officer, if not a current officer, or the National Organization for Women, present at these proceedings right from the beginning—I would like to know how Mrs. Heide is here to rebut our testimony. Because if she is here to make a speech, or if she is here to testify as a complainant, I object vigorously to the complainant patching up his case at the conclusion of the case of the—. We are not interested in hearing Mrs. Heide make a speech.

*The Chair*: I think before we could make any ruling, we have to hear the questions.

*Mr. Volk*: He could make an offer. I would like to hear him make an offer as to what Mrs. Heide is going to say.

*Mr. Esper*: Well, if the Commission, please, Mr. Seli made several assertions in his examination, indirect, on behalf of The Pittsburgh Press, one of which concerns what happened when the Pennsylvania Human Relations Commission, when they met informally I believe, and he testified that they sent out a press release. Well I think Mrs. Heide is competent to testify that this might not have been all that was done; that this is proper rebuttal in that particular aspect. Mr. Seli also talked about the convenience of readers of the classification of want ads. I think Mrs. Heide is competent to rebut that. I feel that as we go on with the questioning, anything that is offensive or not proper rebuttal, Mr. Volk would have an opportunity to object to.

*The Chair*: I think we should hear the questions.

*Mr. Volk*: I apologize in advance to the Commission for what is probably going to be a current of objections. I don't wish to appear to be a litigious and objectionable lawyer. On the other hand, I think we are going to be treated to a distressing mass of irrelevancy. And compounded with further speechmaking it is most distressing to me, so I plan to object whenever I feel that the testimony has gone on to pathways that I am quite sure are inappropriate.

*The Chair*: Well, that may be, but one should not prejudge the testimony which has not yet appeared. So let's have the testimony first.

*Mr. Esper*: May we proceed? What is your name?

A. My name is Wilma Scott Heide.
Q. And where do you live?'
A. I live at 152 White Oak Drive, New Kensington, Pennsylvania.
Q. And, were you subpoenaed to testify here?
A. Yes.
Q. By whom?
A. By the Pittsburgh Commission on Human Relation.
Q. And what is your profession?
A. I am an Associate Research Scientist at the American Institutes for Research in the behavioral sciences, in Pittsburgh.
Q. How long have you been there?
A. Over three years.
Q. Other than your profesional work as a behavioral scientist, what else qualifies you here today as an expert witness?
A. Among several citizen roles, I am a member of the Pennsylvania Human Relations Commission, which is the agency appointed by the governor of the State for enforcement of affirmative action to bring about results in the Commonwealth in relation to the civil rights laws.
Q. Were you present on December 9, 1969, when representatives of the newspapers of Pennsylvania and elsewhere met with representatives of the Pennsylvania Human Relations Commission?

A. Yes.

Q. And would you tell us about that, please?

A. Yes. Mr. Seli testified in an earlier hearing, when he was reminded by Commissioner Reizenstein about the Human Relations Act which applies to employers in Pennsylvania or outside of Pittsburgh —he testified that the Pennsylvania Human Relations Commission sent out only a press release relating to its policy about classified want ads. Mr. Seli was in error about that. I have here a copy of the notice that was sent to all classified ad managers of all Pennsylvania newspapers. This notice was sent, in addition to a press release, to all newspapers— a release that most newspapers, including The Pittsburgh Press, did not choose to print for the benefit of employers, employment agencies, labor unions, and the general public who use the want ads. The notice and the release stated that the Human Relations Commission considers the sex-segregated want ads in violation of the Pennsylvania law, and I am prepared to read that memorandum.

Q. Do you have a copy? Is this the exhibit?

A. I have a copy. I have, also, the signatures of those who attended the meeting, and the correspondence, in this regard, between the Pennsylvania Newspaper Publishers Association and the Pennsylvania Human Relations Commission.

Q. Well, if the Commission please, I would like to have it marked as an exhibit and offered as evidence. In addition to the press release, I think that Mrs. Heide testified that there was a notice that went out, and this is the notice that I want to —

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*The Chair*: And you want—

want to offer it, offer it as evidence, rather than to —

*Mr. Volk*: Well, I consider it irrelevant.

*Mr. Esper*: Then that has been offered into evidence. Do you think your active citizen roles in behalf of civil rights, Mrs. Heide, is compatible with your role as a member of the Pennsylvania Human Relations Commission?

I think my citizen roles are not only compatible, they are absolutely vital to any sensitive, knowledgebale or effective work on a commission. I think advocacy of all rights for all citizens needs to be a basic qualification to be even considered —

*Mr. Volk*: There's a speech. There's a speech.

*The Chair*: Your objection is overruled.

In your view, Mrs. Heide, do the Pittsburgh classified employment ads, with some jobs labelled "male interest" and others labelled "female interest" violate Ordinance 75, as amended by Ordinance 385?

*Mr. Volk*: Objection. Mrs. Heide is not on the Pittsburgh Human Relations Commission and her opinion is totally irrelevant.

*Mr. Esper*: She's an expert in this field.

*Mr. Volk*: Besides, she's already proved she's biased.

*The Chair*: I am sorry to say that this is not a very acceptable question. The objection is sustained, as to the violation of the Pittsburgh Ordinance.

Q. Mrs. Heide, the Pittsburgh Press, representative Robert Seli, stated that this segregation of ads by sex is done "for the convenience of readers." That is a quote, for the convenience of the reader. And that it is, in some other peoples experience, that men and women generally have different job preferences. In your view is this a bona fide occupational qualification —

*Mr. Volk*: Same objection .

Q. That should exempt the Pittsburgh Press from the provisions of this ordinance?

*Mr. Volk*: Same objection. I'd have to consider Mrs. Heide a protagonist of these particular sociological concepts of the National Organization for Women and not an impartial or judicial officer with any standing to give any legal opinions such as this. The legal opinions of this Commission are the ones we're worried about, not those of Mrs. Heide — we know what they are.

*The Chair*: Would you repeat the question?

Q. The Pittsburgh Press' representative, Mr. Seli, has stated that the segregation of ads by sex is done for the convenience of the readers, and that it is in other peoples experience that men and women generally have different job preferences. In your view, is this a bona fide occupational qualification that should exempt the Pittsburgh Press from the provisions of this ordinance?

*The Chair*: Let me make this clear. Even though Mrs. Heide were in law as a member of the bar, she could not give an answer as to the validity

of certain acts being exempt, prohibited, or permitted by our ordinance. What I suggest is that you rephrase your question.

*Mr. Esper*: Well, let me ask Mrs. Heide if in her view whether or not this is a bona fide occupational difference, without reference to exempting the Pittsburgh Press from the provisions of the ordinance. Do you think it is a bona fide qualification?

*Mr. Volk*: I'm going to object. The whole thing is totally —

*The Chair*: Would you repeat the question?

*Mr. Esper*: The segregation of ads by sex, as Mr. Seli stated, is for the convenience of the readers, if, as is some other peoples' experience, men and women generally have different job preferences. I was asking Mrs. Heide, whether or not in her opinion, that was a bona fide occupational difference with respect to sex.

*The Chair*: Are you going to object?

*Mr. Volk*: Yes. Mrs. Heide is the prosecutor, in effect, in this case. Mrs. Heide is, to all intents and purposes, the complainant. This is like asking the victim of a robbery, or an alleged robbery, whether the victim thought the robber was guilty of robbery. This is not a reasonable judicial proceeding. Let her testify to facts. I'm not interested in her legal conclusions, and I should certainly hope that the Commission isn't either.

*The Chair*: I will sustain the objection. I will ask the question myself. In your opinion, based on

your qualifications as a member of the State Human Relations Commission and your research experience, whether it is more convenient for the readers, or not, to have the ads separated by sex?

A. I think in the absence of any data or any study, other than that presented by the Dr. Bem, we don't really know what's more convenient. I would submit that many witnesses have been asked to testify to their view on this, and there has been no prior objection to their testifying, whether or not they are members of the Commission, or attorneys.

*The Chair*: I have another question: whether, in your view, it is more facile, easier or not — I just want your view not even a scientific viewpoint, just a view based on your experience and your educational background.

A. It is difficult to answer about convenience without knowing the context. If you want to say it is convenient for females to look only under these jobs listed for females, that's more convenient because it cuts down the number of jobs they must look at. But, if one is thinking of convenience in terms of having a service like the newspapers provide, listings of opportunities — all the opportunities that are available — then I would say that it is certainly not a convenience. It's a limitation. Does that answer your question?

*The Chair*: That answers my question. Proceed.

Q. Mrs. Heide, we were talking about the disclaimer — you are aware of the disclaimer that appears in the Pittsburgh Press want ad sections — notice to job seekers, etc., that they are doing this for

the convenience of the reader. Now, let me ask you, in your opinion, does this "notice to job seekers" represent compliance with the various State and —

*Mr. Volk*: Same objection. That's what we're here to determine.

*Mr. Esper*: Well, see —

*Mr. Volk*: That's the function of the Commission, not Mrs. Heide.

*The Chair*: What was the last part of your question?

*Mr. Esper*: I had asked her, in reference to this notice to job seekers, that we were talking about, whether in her view, that by placing this notice in the paper there is a compliance with the various City and State and National Civil Rights laws, pertaining to this subject.

*The Chair*: I will sustain the objection, and ask a question. Is it compliance with the Pennsylvania Human Relations Act, as interpreted by the Commission — as a Commissioner, do you know?

A. I do know. And it is not, as indicated in this memorandum, entered into the record.

Q. The answer is that it is not, is that right?

A. Yes.

Q. I have one last question of Mrs. Heide. Mr. Seli has testified that not many individuals have complained to the Press about the sex-segregated want ads. Is it possible that most people want it the way it is? I don't think there will be any objection to that. [laughter]

*Mr. Volk*: You're asking her for a possibility. It might be irrelevant, but it's not calling for a legal conclusion. I'm not going to object.

A. Many individuals have complained to the National Organization for Women and to me, individually, as a State Commissioner. Most people, including many psychologists who work and write as industrial psychologists, haven't thought about it, let alone challenged the status quo. And that, I think, is precisely the power of behavioral practics. Few people do challenge them. And this I could indicate from the literature, and I think we are aware of it. Furthermore, a reading of NOW's complaint shows, and a reading of the ordinance shows, that there is no necessity to, nor did it, indeed, state an instance of an individual person who was aggrieved. It is enough to be aggrieved, without going through the public hearing and sharing of one's troubles, including the revealing of very private information. Its precisely the system as part of a larger employment practice that disadvantages especially women, and men in other ways, and does perpetuate the sex role stereotyping.

*Mr. Volk*: Now she's giving a speech. This is not responsive to the question.

A. To answer the next part of the question. We don't know what way most people want it, unless we provide alternative ways. I think we do have some evidences from the evidence supplied by Dr. Sandra Bem this morning.

*Mr. Esper*: Your witness, Mr. Volk.

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CROSS EXAMINATION OF WILMA SCOTT HEIDE

*By Mr. Volk:*

Q. Mrs. Heide, what degrees do you hold?

A. I have a Bachelor of Arts, with a major in sociology and a minor in psychology. And a Master of Letters, with a major in psychology and a minor in industrial administration. I'm also a registered nurse and I have some work beyond that in a doctorate degree.

Q. You have put into evidence a memorandum by the Pennsylvania Human Relations Commission of which you are a member, to — allegedly, I believe, actually, — to classified ad managers of various Pennsylvania newspapers. Who wrote that? Who wrote the text of it?

A. The text was written by our Public Information Officer, under the direction of our Executive Director, and with the direction from the Commission based on their policy decisions.

Q. What worries me with reference to the memorandum, what worries me is that it's awfully similar to various wordings that I've heard you use. Did you write it? Did you have anything to do with its writing?

A. No, I did not write it.

Q. Did you edit it?

A. No, I did not.

Q. Did you write a draft of it?

A. No. I saw the copy of the memorandum after it went out, and after the newspaper publishers, in response to this, had called for a meeting with the Commission.

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Q. Mrs. Heide, when this memorandum was issued, you said there were several signatures on the original memorandum?

A. No. I did not say that. I said that there were signatures of those present at the December 9th, 1969, meeting.

Q. You mean the meeting at which I and Mr. Seli and Mr. Albright —

A. That's right. That's right.

Q. Well, who approved the memorandum?

A. The Executive Director, in consultation with the Chairman of the Commission, Mr. Max Rosenn.

Q. Was a vote of the Commission taken, whether or not this was the official position of the Commission?

A. The vote of the Commission was taken prior to the issuance of the memorandum. The memorandum was an implementation of the policy decision.

Q. Let's talk about the policy decision. At what kind of a meeting was the policy decision made?

A. At a regular meeting of the Pennsylvania Human Relations Commission. We meet monthly.

Q. What meeting was that, can you remember?

A. Well it was probably — it might have been late in November.

Q. Were you present?

A. Yes, I was present.

Q. How many other members of the Commission were present?

A. I couldn't tell you without going back to the record.

Q. Was there a majority of the members?

A. There must be a majority in order for us to have a quorum to conduct business.

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Q. Were hearings held? Were the newspapers given an opportunity to present their side, to present briefs and legal argument?

A. No.

Q. This decision was made in closed-door session?

A. How do you mean, when you say "closed door"?

Q. No public hearings were held.

A. That's right.

Q. The newspapers were not given an opportunity to even express objections. Is that correct? — prior to the issuance of this memorandum.

A. That's right.

Q. Was this memorandum published in any official state document, any official state compliation of regulations, or administrative rules?

A. I think you would have to check the public documents.

Q. But not to your knowledge?

A. Not to my knowledge. Yes.

Q. What positions, if any, do you hold at the present time with the National Organization for Women?

A. I am a member of the National Board of Directors, and I have been asked to be Pennsylvania Convenor.

Q. What does that mean?

A. I think it would be best described as an organizing role.

Q. Do you not believe that this puts you in conflict with the judicial role that should be assumed by a person sitting on a quasi-judicial body such as the Pennsylvania Human Relations Commission?

A. No, I do not. I think that the civil rights law and ordinances of our land advocate civil rights for all

our citizens. That is precisely what the NAACP advocates, what NOW advocates, what numerous civil rights organizations advocate; so I think it is not incompatible.

Q. You think that sitting on a commission as a radical activist for an extremist organization [laughter] does not constitute bias?

*The Chair*: Excuse me. I would like to have extraneous radical statements stricken from the record.

*Mr. Volk*: Well I think it was accurate.

*The Chair*: That may be, but I think it is inappropriate.

*Mr. Volk*: Well, it is significant.

*The Chair*: If you can tone it down, yes.

*Mr. Volk*: It is very difficult to tone it down. Those are correct words. Let me strike the whole question; I know what the answer's going to be anyway. However, I want the record to reflect our continuing objection to Mrs. Heide as testifying as an officer of a State agency, when she is the major officer in an organization which advocates an exposition vis a vis a certain segment of the civil rights law.

*The Chair*: The record will so reflect.

*Mr. Volk*: I have nothing further.

*Mr. Esper*: Well, I would just like to state, Mr. Chairman, that throughout these proceedings Mr. Volk had alluded to the extremism, etcetera, of this

organization. I think this organization is in pursuit of a lawful justice and, call it by whatever name you will, I think it is a tool of progress. I think it is more in conformance with establishing equality of the sexes, as we have equality of the races. And so forth.

*Mr. Volk*: They have the perfect right to pursue this end. An organization, to my knoweldge, has an absolute legal right to exist and pursue the ends it seeks. But when they put one of their activist members, one of their leaders, on a quasi-judicial body such as the Pennsylvania Human Relations Commission, this is improper. However, this is not a matter for this Commission.

*The Chair*: No, but it's a matter for discussion.

*Mr. Volk*: But I object to it only as to the credibility and authenticity and the impartiality of the testimony of the witness as an officer of the Pennsylvania Human Relations Commission.

*Mr. Esper*: Well, I am sure the Commission does consider each witness in their capacity as witnesses. I think its not lost on the Commission; I think they do consider that. And whatever Mr. Volk is saying, I think it is obvious to the Commission they will consider it.

*Mr. Volk*: No further comment required.

*The Chair*: The only comment I would make is that we will consider every text of the record, including counsel's comments, that appointment to the State Commission is made by the Governor, and that the City Commission has no control over the

Governnor of the Commonwealth. So, whether it is a proper appointment or not I would refer to counsel to complain to the Governor.

*Mr. Volk*: We only bring it up, sir, as pointed out in evaluation of the testimony of the witness as an official of that body.

*The Chair*: All right. Thank you very much.

*Mr. Esper*: Thank you. If the Commission please, this concludes the complainant's rebuttal in the case and the only thing that remains to do is to summarize. And I would like to have Mr. Valadez — if this is the proper time — to summarize in closure what has transpired. With the right of other counsel having the same equal opportunity.

(A recess of ten minutes was then had)

*The Chair*: I would like to ask the amicus curiae whether he would like to make his comments before the both sides make their closing arguments, or after.

*Mr. Albright*: Mr. Chairman, I think the amicus American Newspaper Publishers Association, with the Commission's permission, would like to make their's after.

*The Chair*: Would you please make your summary, Mr. Valadez.

*Mr. Valadez*: Our complaint charges the respondent with violation of Section 8(J) of the Pittsburgh Human Relations Ordinance.

It is our opinion that the testimony given at this hearing abundantly supports our complaint in

that the respondent — the newspaper with the highest circulation in the area and carrying substantially all of the classified employment advertisements in the area — has arbitrarily constructed a rigid set of sex-segregated classifications for their employment advertising, thus affording those employers wishing to discriminate a vehicle by which they may do so, and forcing those wishing to comply with the law to either express a sex preference or suffer additional expense by advertising under more than one classification. This practice continues even though, as the testimony indicates, this Commission has made clear to respondents that the Pittsburgh Ordinance (covering Pittsburgh employers) prohibits sex discrimination in this manner, and the Pennsylvania Human Relations Commission has likewise informed respondent that State laws similarly ban sex discrimination in this manner.

A portion of the Declaration of Policy of the Pittsburgh Ordinance is to the effect that the policy of the City of Pittsburgh is to exercise its powers to assure the right and opportunity of all persons to participate in the . . . economic life of the City . . . and prohibits discrimination because of sex in employment. The passage of this Ordinance recognizes a fundamental axiom of an industrial society —that an individual to be integrated into the political and social community must first be integrated into the economic community. Today, economic citizenship is the passport to political and social citizenship and this the Ordinance, at least in theory, recognizes.

The right to equality of opportunity in employment is basic to our society. It should require no argument to show that the right to work for a living in the common occupations of the community is of the very essence of personal freedom and opportunity. In sum, we view rights to equal employment opportunities as preferred rights, on the same scale as freedom of speech.

The first and most desirable objective of our complaint is to cause the respondent to be persuaded that they have a responsibility to employment agencies and employers to bring about compliance with the Ordinance. Law and order, if you wish. We believe that our presence here—in this controversy or confrontation — is occasioned because the respondent resents government intrusion into what it has always considered an area of private decision making.

Let us dwell for a moment on the Ordinance. The Ordinance reflects, beneath its surface, a social revolution whose objest is to refashion American institutions so that both personal freedom and institutional freedom can exist. The Commission shoud recognize that we have moved from a mercantile society based upon real property and contract to an industrial society based upon intangible property and status. For the vase majority of citizens, the most valuable property is not their automobile or their home, but their job, their profession, their rights, and the right to use their labor and skill has become their most valuable property right. If personal freedom is to be maintained within our society, the legal process must provide

the same safeguards to the new property of right to use their labor and skill, as it afforded the old property.

It is our contention that the equal employment opportunity will be protected and advanced if the Commission adopts a view regarding discrimination as a public wrong and not a private wrong. For sex discrimination, like racial discrimination, is by definition a class discrimination. If it exists, it applies throughout the class. And although the actual effects of a discriminatory policy may vary on various members throughout the class, the existence of a discriminatory policy threatens the entire class. The criterion should not be the actual impact of discrimination upon the complainant, but the potential impact of the discrimination. If the Commission will view the acts of discrimination by respondent as a prima facie wrong, the Commission will be protecting the economic rights of women by compelling the respondents to come forward — if they can — with higher social reasons to justify their discrimination. The chief function of a free society is that of enhancing personal freedom and human dignity. The Ordinance should be interpreted as imposing institutional checks upon organized centers of power, on behalf of the unorganized individual. The theme should be institutional responsibility, not institutional immunity.

We ask that the complaint be allowed and an appropriate order issued.

*The Chair*: Mr. Volk.

*Mr. Volk*: We think that the Commission has before it a serious and complicated problem. This isn't as easy as many of the other questions that might come before such a Commission is concerned.

This — you — are one of the first agencies in the United States, properly constituted before a full hearing with rights of all people to be heard—no backroom sessions—but a full hearing held publicly, to have this question put before it. You are, willing or not sir — and lady — sirs and lady — leaders, forerunners in this field of law. What you do here in Pittsburgh, although it affects only our city, is going to be viewed nationwide; it is going to be quoted by other cities and by other agencies in other states as well as Pennsylvania. You can easily, very easily, follow the closed door hearing ruling of the Pennsylvania commission, or you can follow the three-to-two, third change of mind, by the Equal Employment Opportunity Commission in issuing a guideline saying that such advertising is violative of the National Civil Rights Act, or, you can take an independent course and you can decide the question without regard to particularly questionable rulings in deciding a Pittsburgh problem based on the evidence here today. And that, I am quite sure, is what a commission of this caliber will do. I have great faith in the Pittsburgh commission, as opposed to some others I can think of.

We must regard that sex was added to this law and added to all of these laws as an essential afterthought. We all know the ridiculous and questionable way that sex got added to the Federal Civil Rights Act, added by southern Congressmen in an

effort to defeat the whole law. We wound up with a word in there that has never been adequately discussed judicially, never been subjected to give and take of politics in Congress, and sex was just added at the end of a string of other terms in the law—race, religion, national origin and sex.

But, there are differences between the sexes that do not exist between the races, between nationalities, between ethnic groups; there are differences, despite the testimony of the complainant tending to minimize these differences. Ladies and gentlemen, we have eyes, we can see these differnces, we know that they exist, and no evidence has been introduced to show that they don't. We all know what we see with our eyes, that men and women are much different in regard to employment than are whites and negroes, whites and blacks, christians and jews, mexican americans and american indians; there are differences that apply to men and women that aren't there when we come to these other categories and nobody has shown that they aren't there.

We feel that the biggest trap that this Commission could fall into is equating sex as just one other discriminatory medium. This will be, this will set up a legal chamber of horrors that will haunt us all for years to come and we are already beginning to establish legal precedents that will apply when age cases come up. And there are differences between age, old people and younger people, vis a vis jobs. Would it be improper in St. Petersburg, Florida, to put a want ad in the paper for senior citizens, a category senior citizens interests, where you have

a retirement community, and you want to advertise light jobs that senior citizens can actually do? No, it wouldn't be. Because there are adequate differences in a community like that. There are enough old people in the community to appeal to; and it would be perfectly proper to set up a classification in your want-ads "jobs—senior citizens", and this is what we say is the case between men and women. There is a significant body of job interests that the press has a right to cater to it.

The want-ads themselves are on their face nondiscriminatory. They don't say "male only", they say "male interest". There is a disclaimer box on every page. If, along with playing with dolls, and counselling, and all the other things that Dr. Bem testified to that influence children in pursuing male roles versus female roles, if, in addition to all of these, want-ads help, this isn't illegal anymore than wrapping your child in a blue blanket versus a pink blanket is illegal. It's not illegal; its part of our cultural pattern, to which both psychologists testified.

Let me point out to you some of the places where sex is a difference, where race is not. I want to point out to you over and over again the difference between the racial questions and the sex question. Let's consider restrooms. I think that every black man in America is well aware of the indignity and stigma that is attached to the colored and white restrooms, in the South during the Jim Crow days, and I think even today in a lot of places; and yet we have male and female restrooms. Why is one heinous and improper and one not? Simply because

there is a difference between men and women that doesn't apply to the races. Men and women are modest about going to the bathroom with each other. They do it in the United Nations, they do it in Japan, they do it in France. They use common restrooms; but in our cultural they don't. And I don't think this Commission is about to sit here and tell Kaufmann's department store that it has to have one restroom for men and women. And yet you will certainly tell Kaufmann's department store they can't hang a sign "colored only" over a restroom. That is a legitimate difference between the sexes, that has to be judicially taken into consideration by this and other bodies interpreting a law that was badly written to begin with, by merely adding sex in with all of the other criteria.

Another one is women's stores—stores that cater to women—sell only women's clothes. Is this to be ruled out as illegal, as sexual discrimination? If I put up a store and said "whites only", you're darn right it would be illegal. But if I put up a store for women's clothes or men's clothes, is that illegal?

What about women's hotels? Right down the street here the Salvation Army maintains the Evangelarian residence, a hotel, in fact a rooming facility, for working girls. Not working people—working girls, who want to live there. Are we now to tell the Salvation Army they have to put men in there? Or can they maintain a proper facility for girls. This is the type of questioning you are leading into. This is the type of question you're going to have to answer. And we ask you to consider all of these problems now, when you've got this one before you.

It's so easy for you to simply follow the E.E.O.C. and say they did it, we can do it. That's easy. Perhaps it may be what the Board in its best judgment will do. But I'd like to point out to you the dangers of this, the future questions that are coming up, and that somewhere along the line you're going to have to draw the distinction between sex and race. Its an imperfect analogy, it is a wrong analogy, it is bad. And if you don't draw it here, you're going to have to draw it on the restroom question, if in fact it ever does.

Rooming houses. Boarding houses. A house for girls only. A lady called Mrs. Murphy kind of thing in the Oakland area who has twelve rooms to rent and wants to rent them only to college girls. Are you going to tell her she can't do that? Maybe you are, I don't know. But this is the type of thing you certainly wouldn't tell her she could rent them only to white kids, or permit her to have only Jewish kids. But I think you will say she can have girls only if she wants to, or only boys.

There are differences between the sexes. And I ask you, is using your common sense, and listening to the testimony to reflect that the differences do indeed manifest themselves in job preferences. And that by screening the ads, as we have done, in very close cooperation with Mr. Washington and his Commission, and eliminating discriminatory wording from the ads, the ads can be placed in groupings according to what the employers, the employees and the newspapers feel to be the general pattern of interest. We ask that you not hold this practice to be improper. This is a serious question of far reaching national consequences.

Now you will notice that I have addressed myself only to the substantive issues. I have not backed up on any of the technical defects of this complaint, or this proceeding, and I certainly do not wish to bore you with all that again. We will argue it in our briefs. I am sure that NOW or somebody will, regardless of which way this thing rules, these technical questions may come before a court but, despite whatever technical questions the American Newspaper Publishers Association will raise, what they're asking for here is wrong. They are asking you to extend the law beyond its bounds for an improper purpose and we ask, humbly ask, respectfully ask you don't do it.

*Mr. Albright*: Mr. Chairman, my name is Ralph Albright. One counsel for the American Newspaper Publishers Association. I don't know if you've had an opportunity to sift through the briefs, but I want to tell you that the ANPA is a New York membership corporation, which consists of members totalling over one thousand daily newspapers across this nation. And in that representative capacity I think it's obvious that we do have an interest in the outcome of this proceeding.

As a preface to my remarks let me point out the ANPA's position on two points. And that is, under no circumstances does an advertiser, by placing an advertisement under a male or a female column heading, violate either the Pittsburgh Ordinance, the Pennsylvania Statute or the Civil Rights Act of 1964. It is only when an advertiser discriminates in hiring is a violation committed. A preference is indicated only by the refusal to hire based

on either race or sex, where sex is not a bona fide occpational qualification. Moreover, these headings, as was pointed out, are separated for reader convenience. We're not discriminating for the Press or the newspapers in general. I'm not discriminating against men and women when they separate these headings. This recognition, as Mr. Volk pointed out, that readers prefer it this way. They recognize the obvious fact which was testified to here that there are some jobs that are primarily of interest to one sex or the other. Because they are primarily of interest to one sex or the other, however, does not mean that a woman interested in a "job-male interest" position cannot go and apply there. When she goes and applies there, and is refused arbitrarily that job, that's when an unlawful employment practice occurs, not by the placing of a non-discriminatory advertisement under a column labelled male or labelled female.

It's also the position — this is the second point I want to make — of the American Newspaper Publishers Association that under no circumstances can this Commission nor any other commission nor federal agency tell the newspapers that they can't have separate male and female headings. And that's basically obvious, because there are exemptions from these acts. In the case of the Pittsburgh Ordinance there's an exemption for domestics, there's an exemption for employers with less than five employees, the act only applies to employers within the City limits of Pittsburgh, not to those outside the city limits or outside the state. Those employers outside the state, even though they have more than

five employees, may freely place an advertisement under a male or female column heading even if sex is not a bona fide occupational qualification. An employer with less than five employees can place an advertisement under a sex column heading even if there is no bona fide occupational qualification for sex. That position I want to make very clear on behalf of our client.

Another point that I would like to introduce is to attempt to persuade you, as I think Mr. Volk effectively did, that the racial analogy is inapplicable to these proceedings. It's inapplicable for one fundamental reason and that is it's already been decided. The Congress of the United States has already decided, the Pennsylvania Legislature has already decided, the City Council has already decided, discrimination may be perpetuated against women if sex is a bona fide occupational qualification — so says the legislative bodies. But, discrimination on the basis of race may not be perpetrated because under no circumstances according to the legislatures is race a bona fide occupational qualification. In short, there is no reason for recognizing whatever differences there may be phychologically between the races. The legislature has decided to ignore the psychological validity, if you will, of that point. They will not recognize a difference between the races. But they will between the sexes, otherwise why would they put in exceptions, bona fide occupational qualifications? A bona fide occupational qualification must exist otherwise they wouldn't have used that term.

Now, let me comment on, if I may, what I con-

sider to be some fairly egregious errors on the part of Mrs. Koontz — you remember she was the lady from the United States Department of Labor. Mrs. Koontz said that the guidelines of the Equal Employment Opportunity Commission were binding on the newspapers. The newspapers have to follow them. I think we also pointed out to this Commission that this organization is involved in litigation in the federal courts right now on this point, that is the statutory position of the Equal Employment Opportunity Commission promulgated guidelines. In connection with an initial decision on that very point the United States District Court in the District of Columbia said that these guidelines of the E.E.O.C. are binding on no one. Absolutely no one. They have no force and effect of law. I would like, with your permission, Mr. Chairman, for the record to reflect that I have a certified copy of the honorable Howard F. Corcoran's decision in this case which I would like to be added to the record. If counsel wants to examine it, here is the certification.

Mrs. Koontz, Mr. Chairman, also said that the guideline itself applies to newspapers. I'd like to introduce a copy of the Federal Register in which this guideline appeared — an official document of the Federal Government, in which agency promulgations appear — dated February 4, 1969, with the guideline, and nowhere within the body of that guideline is there any reference to newspapers. In fact, newspapers, the Equal Employment Opportunities Commission has admitted, are not covered by the Civil Rights Act of 1964. In addition to the

Commission saying that, in addition to Judge Corcoran saying that in his decision, the Congress of the United States also said that, in so far as the applicability of the Civil Rights Act to newspapers. In its report, reporting out the Civil Rights Act bill, out of the House of Representatives, the Congress said the prohibition of this section, that is, the section prohibiting unlawful indications of preference in advertisement do not require newspapers and other publications to exercise any control, or supervision over, or to do any screening of the advertisements and notices of the publisher. The Pittsburgh Press does screen. It screens the body of individual advertisements for any indication on the basis of sex. But they don't have to. Not under the National law, I submit not under the State law, nor under this Ordinance — and as a matter of fact to require them to do so, we would submit, would be a violation of the Constitutional guarantees against due process and also a violation of the First Amendment. That's what's lying behind Congress's decision not to require newspapers to screen — that's what's lying behind the State Legislature's decision to exempt newspapers from liability for false ads — the idea that it would be an onus, a ridiculous, unreasonable burden to place on newspapers to require them to determine whether an ad is false, whether an ad is discriminatory, whether an advertiser is covered by the Act, whether in fact a bona fide occupational qualification exists or doesn't exist, assuming the advertisers know.

I submit, Mr. Chairman, that this Commission, the Equal Employment Opportunity Commission, and, in fact, the Courts have been unable to define

what a bona fide occupational qualification is. It has to exist, notwithstanding Dr. Bem's protestations to the contrary otherwise there would be no need for the Congress, the City Council or the Pennsylvania Legislature to mention it as an exception. It exists. What is it? I submit that this Commission has difficulty in defining it, and if this Commission has difficulty in defining it, how can you expect the classified advertising manager of the Pittsburgh Press to make a determination whether the ad or whether the employer has a B.F.O.Q. for the position advertised. That's one effect which you will require him to do if you attach any liability whatsoever for his publication of an advertisement.

Let's look at our initial objections to the complaint, Mr. Chairman. You recall, in the beginning, we objected to the complaint because it was vague. As an indication of that vagueness try an answer this question. What does NOW want? What is the complainant looking for? I don't know. Do they want the Press to completely eliminate the sex indications in column headings? I don't think they do because at least the attorney making the argument for the Women's Equity Action League indicated that its not their position that separate classifications are a violation, per se. Because they recognize these exemptions. They recognize that employers not covered by the Act can place an ad under male and female. They recognize that an employer who has a position to which a B.F.O.Q. is attached can place it under male and female. What do they want? Do they want you to issue an order telling the Pittsburgh Press not to accept ads from employers covered, where the ad is advertising a

position to which no B.F.O.Q. attaches? I don't think they want that either. Because how possibly could the Pittsburgh Press make that determination. There are no guidelines as to what a B.F.O.Q. is, or if there are they are extremely vague and you can't expect, I believe, in all reasonableness, to require a layman, a classified advertising manager, or more particularly, his staff to make those legal determinations. I don't know what NOW wants. It's not stated in the complaint. They don't seek any relief. I think perhaps nothing so formal — to teach people, to tell people that women are discriminated against. Maybe that's true. Probably is true in a lot of situations. But the Pittsburgh Press is not discriminating against anyone. If there is any discrimination from which they want relief, let them bring in the employer who fails to hire on the basis of sex, arbitrarily. There's no reason the Pittsburgh Press should be involved in this.

Technical arguments we have a lot of. I think it's obvious that the complainant, assuming the complainant is NOW, never stated a complaint, never presented any testimony at all as to an advertiser covered by the Act placing an ad under male or female and showing that they, that is an individual, who was discriminated against in so far as being refused to be hired. None whatsoever. I think that in and of itself renders this whole proceeding fatally defective. In so far as the fatally defective nature of the proceeding, I guess you could look at it from the standpoint of this being a Legislative hearing. You're not considering legislation, Mr. Chairman and members. You're consider-

ing issuing orders, sitting in a quasi-judicial capacity, and in that capactiy you are limited by the strictures of your enabling ordinance. That enabling ordinance says that there have to be facts, there has to be an aggrieved party, there has to be some showing of some advertiser who is covered by the act and placed an ad. Most fundamental, there has to be showing that if the Pittsburgh Press aided and abetted that they had knowledge that the advertiser was covered, that they had knowledge that there was no bona fide occupational qualification. Absolutely not one syllable of evidence in that regard. Not one item.

I have no further words.

*The Chair*: Thank you. The hearing is now closed. The parties, represented by counsel, will submit briefs.

*Mr. Volk*: Yes sir, I think with the complexity of the testimony in the hearing we will have to do that. I think we should do that.

*The Chair*: I would hope that consel for both sides would submit briefs.

*Mr. Volk*: One stricture on that. I think we would like to have the transcript first. This may not be possible, but if possible I would certainly like to have the advantage of a transcript.

*The Chair*: Our complainant will probably make arrangements.

*Mr. Volk*: Perhaps we could negotiate with Mr. Washington as to —

*The Chair*: I think that would probably be the best way as to the proceeding from here on. Stand adjourned. That is all.

*Complaint's Exhibit No. 1.*

# EXHIBITS TO TESTIMONY OF HEARINGS BEFORE THE PITTSBURGH COMMISSION ON HUMAN RELATIONS

## COMPLAINANT'S EXHIBIT NO. 1.

HOW EMPLOYMENT AGENCIES DIVIDED THEIR HELP-WANTED ADVERTISING BETWEEN THE MALE, MALE OR FEMALE, AND FEMALE SECTIONS IN THE SUNDAY PITTSBURGH PRESS ON JANUARY 4th, 1970

Complaint's Exhibit No. 1.

# EXHIBITS TO TESTIMONY OF HEARINGS BEFORE THE PITTSBURGH COMMISSION ON HUMAN RELATIONS

## COMPLAINANT'S EXHIBIT NO. 1.

*Complainant's Exhibit No. 1.*

Summary

Median Salaries of Jobs as Advertised by Employment Agencies
(rounded to nearest thousand)

| AGENCY | MALE | MALE OR FEMALE | FEMALE |
|---|---|---|---|
| Amer. Business Center | 10,000 | | 6,000 |
| Bosch | 11,000 | | 5,000 |
| Consultant Service | 14,000 | | 5,000 |
| Bushee | 14,000 | | no salary |
| Business Men's Clearing House | 9,000 | | 6,000 |
| Career | 12,000 | | 10,000 |
| Computer Search | 9,000 | | 6,000 |
| Cosmopolitan | 12,000 | | 6,000 |
| Don, Lee and Sheridan | 17,000 | | no salary |
| Dunhill | 10,000 | | 5,000 |
| Electronic Systems | 13,000 | | 5,000 |
| Employment Specialists | 11,000 | | 5,000 |
| East End | 6,000 | | 4,000 |
| EMR | 14,000 | | 5,000 |
| Hughes | 9,000 | | no salary |
| Int'l Business | 9,000 | | 5,000 |
| Kearney-McDonough | 8,000 | | 4,000 |
| Liken | 14,000 | | 4,000 |
| McPherson | 7,000 | | 4,000 |
| Montgomery | 10,000 | | 5,000 |
| National Personnel | 9,000 | | 5,000 |
| Pencoast | 10,000 | | 4,000 |
| Pongras | 7,000 | | 5,000 |
| Pyramid | 14,000 | | 5,000 |
| Rittenhouse | 11,000 | | 5,000 |
| Sanford Rose | no salary | | no salary |
| S-B-S | 7,000 | | 5,000 |
| Snelling and Snelling | 7,000 | | 5,000 |
| Strauss | 12,000 | | 5,000 |
| United Consultants | 9,000 | | |

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| | |
|---|---|
| API | 11,000 |
| Anderson | 13,000 |
| Computer Career | 20,000 |
| Cunningham | 9,000 |
| Fisher | ? |
| Fortune | 12,000 |
| Gleason | 14,000 |
| Half | 28,000 |
| James | 11,000 |

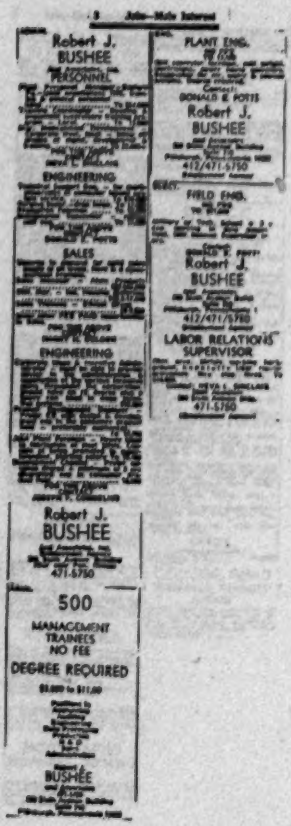
*Complainant's Exhibit No. 1.* 303a

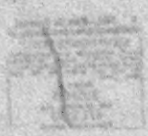
| AGENCY | MALE | MALE OR FEMALE | FEMALE |
|---|---|---|---|
| Malley | 18,000 | | |
| Lane | 13,000 | | |
| Management Search | 18,000 | | |
| McGregor | 6,000 | | |
| Placement Specialists | 15,000 | | |
| Romac | 21,000 | | |
| Sales Consultants | 19,000 | | |
| Technical Search | 14,000 | | |
| Tansett | 16,000 | | |
| Esquire | | | 5,000 |
| Exclusively Girls | | | 5,000 |
| Leonard | | | 5,000 |
| Sherman | | | 4,000 |
| Staff Builders | | | no salary |
| Task Force | | | no salary |
| Towne | | | no salary |
| Triangle | | | 5,000 |
| Cole | | no salary | |
| Gray | | no salary | |
| Pyh. Teachers | | no salary | |
| Medical Hospital Placement | 16,000 | 12,000 | 9,000 |

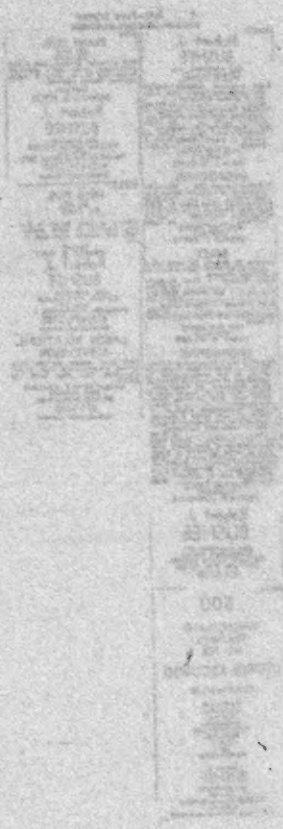
*Complainant's Exhibit No. 1.*

ROBERT J BUSHEE 500 Chg. Vol.

Pittsburgh Press, Sunday, Jan. 4, 1970

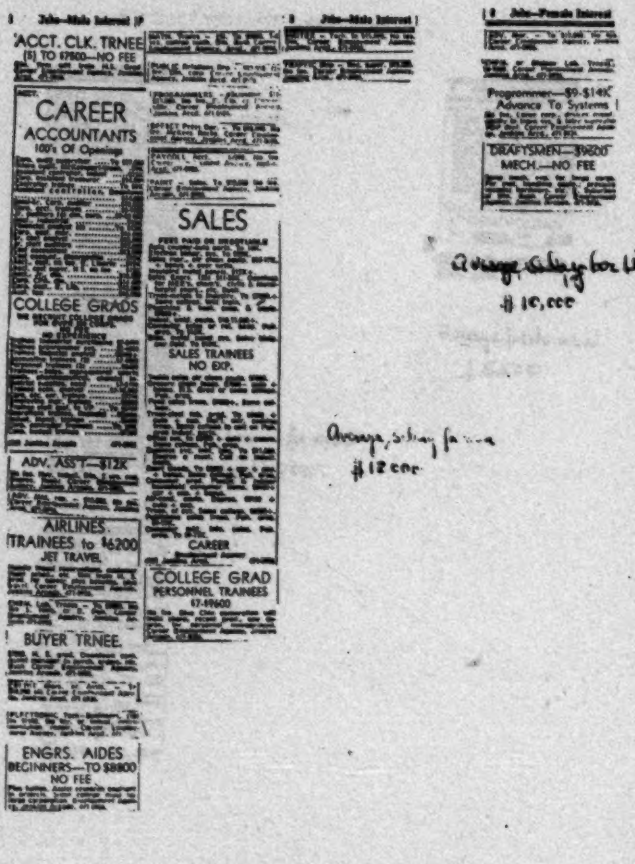






CAREER Jenkins Arcade

Pittsburgh Press, Sunday, Jan. 4, 1970—



ACCT. CLK. TRNEE
[$] TO $7800—NO FEE

CAREER
ACCOUNTANTS
100's Of Openings

COLLEGE GRADS

ADV. ASS'T—$12K

AIRLINES
TRAINEES to $6200
JET TRAVEL

BUYER TRNEE.

ENGRS. AIDES
BEGINNERS—TO $8800
NO FEE

SALES

SALES TRAINEES
NO EXP.

CAREER

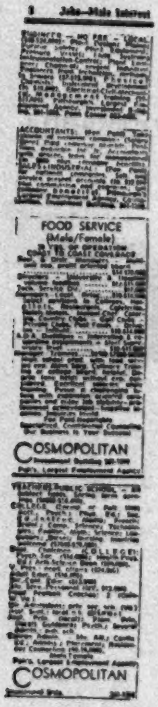
COLLEGE GRAD
PERSONNEL TRAINEES
$7-$9600

Programmer—$9-$14K
Advance To Systems

DRAFTSMEN—$9200
MECH.—NO FEE

Average Salary for Women
$10,000

Average Salary for men
$12,000




Average for men
$12,000

Average for women
$5,500

EMPLOYMENT SPECIALISTS

Pittsburgh Press, Sunday, Jan. 6, 1974

Average
$11,000

Average
$5000

HUGHES
PERSONNEL

HUGHES Pittsburgh Press, Sunday, Jan. 4, 1970—

8 Jobs—Male Interest

STAFF MANAGEMENT TRAINEE TO $12,000

BUSINESS CONSULTANT LOCAL TO $10,000

CLAIMS ADJUSTER TRAINEES $7200 + CAR

NO COLLEGE! YOU STILL QUALIFY FOR MANAGEMENT TRAINING $650-$750

STOCK BROKER TRAINEE TO $9000 + BONUS

MARKETING TRAINEE $650 MO. SALARY

PUBLIC RELATIONS TRAINEE $625 MONTH

HOTEL MANAGEMENT TRAINEES TO $9000

GENERAL OFFICE CLERK $6000

INVESTIGATOR TRAINEE $550 PLUS BONUS

PERSONNEL TRAINEE $700-$800 I-A is OK

OFFICE BEGINNER $125 WEEK

8 Jobs—Female Interest

Admin.

TRAINEE TO BE PRIVATE SECRETARY TO V.P.

A Pittsburgh entertainment oriented firm needs a girl who isn't afraid to do many different things. You will do like typing, handle contracts, schedule conferences etc. If you want a fast moving, exciting job, call now, 261-1055, HUGHES PERSONNEL, 601 Grant St., 4th Floor, Porter Bldg., Employment Agency.

FRONT DESK RECEPTION NO EXPERIENCE NEEDED

Young, but highly successful firm needs a bright young girl to train as their office receptionist. You'll greet clients, answer phone and set appointments. Very exciting salary. Call 261-1055, HUGHES PERSONNEL, 601 Grant St., 4th Floor, Porter Bldg., Employment Agency.

# HUGHES PERSONNEL

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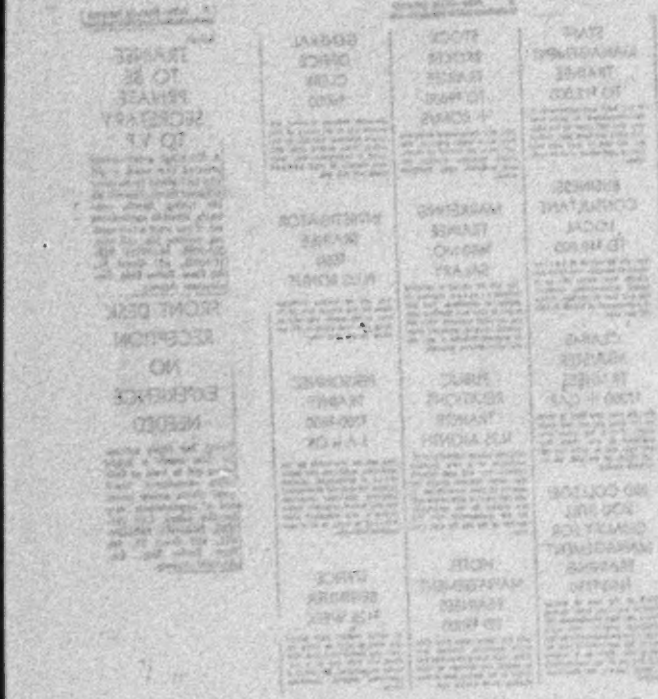
Complainant's Exhibit No. 1.



**Complainant's Exhibit No. 1.** 315a

PANCOAST

The Pittsburgh Press, Sunday, January 4, 1970

$ Jobs—Male Interest

DEPARTMENT MGR. TRAINEE FEE PAID
PANCOAST

STAFF ACCT. $10,000 UP FEE NEGOTIABLE
PANCOAST

SALES MANAGER $16,000 FEE NEGOTIABLE
PANCOAST

Average for men $10,000

CHIEF ENGINEER TO $15,000 YEARLY
PANCOAST

RETAIL MANAGER TRAINEE $175 WEEK HALF FEE PAID
PANCOAST

Average for women $4,000

W Jobs—Female Interest

*Complainant's Exhibit No. 1.*

UNITED CONSULTANTS (continued)

HOTEL DIRECTOR TRAINEE
$775

IE TRAINEE
$750
No Degree

Average income
$7000

007 TRAINEE
$6,600 + Bonus

PERSONNEL TRAINEE
$8,300

Jobs—Female Interest

BOOKKEEPER TRAINEE
$390

PERSONNEL PROMOTION BEGINNER
$500 + Car + Expenses

Average income
$7,800

SECRETARY
$725
Assist The President

SECRETARY TRAINEE
$400
Fee Paid

Mc GREGOR Clerk Cdg.

Pittsburgh Press, Sunday, Jan. 4, 1970

18 Jobs—Male Interest

ACCOUNTING

**Jr. Accountant Trainee**

**$550/MO.**

**FEE PAID**

Local Fish Corp. will train you at their expense to all areas of duty. You will work directly for the Controller for the first 12 months. Benefits for this outstanding opportunity are a 40 hour week—Mon. thru Fri., 8:30 A.M. to 5 P.M., paid holidays, vacation, Life & Hospitalization insurance, Company Co. paid benefit package & 100% tuition. For more information and a confidential interview, call McGregor Personnel, Employment Agency, 1201 Clark Bldg.

391-2840

**ACCOUNTANT, JUNIOR**

**$525 - $550**

**FEE PAID**

Local Major Firm needs young man with good math aptitude & some experience in General Accounting to handle responsibilities in newly created position within cost dept. Work under direct supervision of department head while learning company's cost methods. Complete benefit package + 100% tuition. For more information call, McGregor Personnel, Employment Agency, 1201 Clark Bldg.

391-2840

ACCOUNTING CLERK

Life being one hours away. Immediate openings in Greensburg branch of national company. Salary $70 to $80. To start. Call McGregor Personnel, Employment Agency, 1201 Clark Bldg.

391-2840

**ACCOUNTING MANAGER**

**$12,000/START**

**NO DEGREE**

Local subsidiary of Nationally known Corp. needs a man to supervise small accounting department. Similar position plus supervisory experience necessary also knowledge of Systems/methods. Company offers outstanding benefit package including, B/C-B/S, M.M., Life, Paid vacations, 10 Holidays, free parking, 100% Tuition and Pension Plan. For more information call, McGregor Personnel, Employment Agency, 1201 Clark Bldg.

391-2840

Adm.

**PURCHASING TRAINEE**

**$8400-$9600**

**ANY COLLEGE DEGREE**

**LOCAL FEE PAID**

Local Major Manufacturing Company with many expansions in its future has openings for 2 graduates to train for positions as Purchasing Agents. Company is one of the largest manufacturers of wood products in the area. Call McGregor Personnel, Employment Agency, 1201 Clark Bldg.

391-2840

**CREDIT INTERVIEWER**

You will enjoy a variety of public contact responsibilities in this challenging position including interviewing applicants, checking credit, and approving loans. $735 to start. Call McGregor Personnel, Employment Agency, 1201 Clark Bldg.

**Electronic COMPUTER TECHNICIAN 4**

Tech school or military electronics, with knowledge of solid state qualifies you for outstanding position with this Major firm. You will be installing & maintaining 3rd generation computers at customer locations. Pgh. area.

**$115 TO $130/wk. TO START**

+

3-6 mo. Co. paid school WHILE YOU EARN FULL SALARY

+

100% TUITION

+

STOCK OPTION

Call McGregor Personnel, Employment Agency, 1201 Clark Bldg.

**Electronics Tech 5**

Tech School or Military Electronics qualifies you for a field service position with a National Electronics Corp.

**SALARY $470 TO $590/mo. START**

**NO FEE**

FULL SALARY WHILE IN CO. PAID SCHOOL

+

NEW CO. CAR

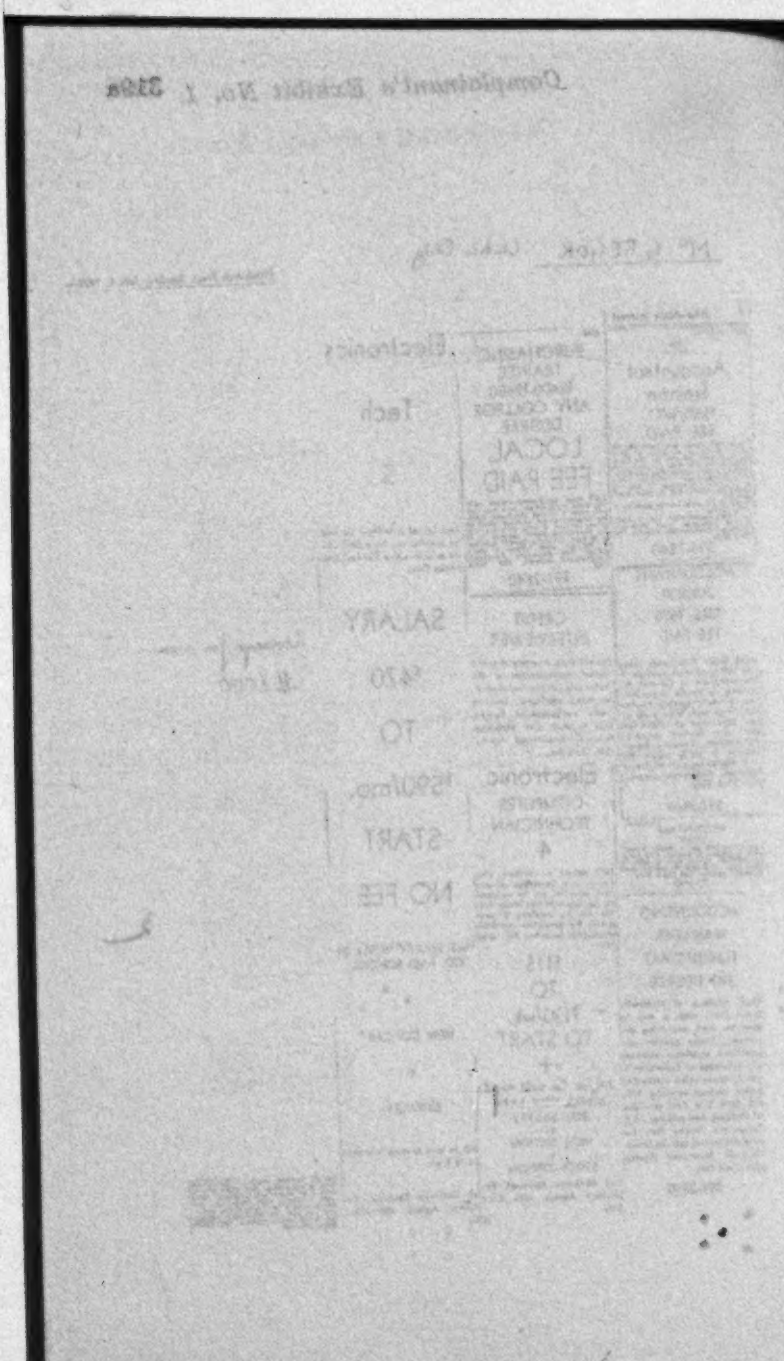
+

EXPENSES

Coverage for men $6000

ull be able to move into Mgt. 2 to 5 yrs.

ll McGregor Personnel, Employment Agency, 1201 Clark Bldg.



ROMAC Rossman Bldg.

Pittsburgh Press, Sunday, Jan. 4, 1970

| 2 John—Male Interest

## Data Processing and Accounting

**COBOL Programmers**
2 years experience in industrial applications. (Telephone, Television, Hospital).
$10,000

**Marketing**
3 years proven marketing record with knowledge of communications, EDP or similar industry.
To $22,000

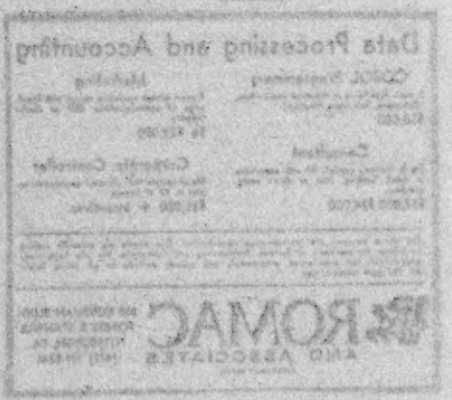
**Consultant**
Big 8 Nation's capital. EDP with experience in retail, banking, steel or Gov't supply positions.
$17,000-$24,000

**Corporate Controller**
Major eastern N.Y. chemical corporation, report to VP of finance.
$35,000 + incentives.

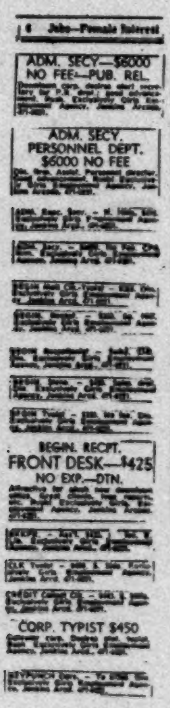
The above positions are representative opportunities. Our clients are currently seeking candidates for managers of Systems, Programming and Operations. We also have many opportunities for experienced programmers and systems analysts at all salary levels. All fee paid opportunities.

ROMAC AND ASSOCIATES
Employment Agency
890 ROSSMAN BLDG.
FORBES & STANWIX
PITTSBURGH, PA.
(412) 391-5344

Computer programmer
# 21,000


ROMAC
AND ASSOCIATES

EXCLUSIVELY GIRLS Jobs for Women Pittsburgh Press, Sunday, Jan. 4, 1970—



6 Jobs—Female Interest

ADM. SECY.—$8000
NO FEE—PUB. REL.

ADM. SECY.
PERSONNEL DEPT.
$6000 NO FEE

BEGIN. RECPT.
FRONT DESK—$425
NO EXP.—DTN.

CORP. TYPIST $450

Average for Women
$5,200

*Complainant's Exhibit No. 1.* 325a

MANPOWER — N. American Rockwell Bldg. — Pittsburgh Press, Sunday, Jan. 4, 1970—

8 Jobs—Female Interest

Comptometer

**KEYPUNCH AND COMPTOMETER OPERATORS**

Top financial rewards for temporary keypunch & comptometer assignments in top companies around town. The pay is high & the hours are flexible. Stop in or call Manpower this week.

**MANPOWER**

635 N. American Rockwell Bldg.
Cor. Fifth Ave. & Wood St.
Pgh. 391-7030

An Equal Opportunity Employer

**LIBRARIAN**

Required that you have a degree in library science. This is a long term temporary assignment in the Monroeville area. High pay and no fee. Apply

**MANPOWER**

635 N. American Rockwell Bldg.
Cor. Fifth Ave. & Wood St.
Pgh. 391-7030

An Equal Opportunity Employer

**SECRETARIES AND STENOS.**

We have an immediate need for experienced secretaries & stenos and we are paying TOP RATES for these skills. If you would like to work part time for the finest companies in the area please call or apply as soon as possible.

**MANPOWER**

635 N. American Rockwell Bldg.
Cor. Fifth Ave. & Wood St.
Pgh. 391-7030

An Equal Opportunity Employer

*Complainant's Exhibit No. 1.* 327a

MEDICAL HOSPITAL PLACEMENT 2506 5th Ave

Pittsburgh Press, Sunday, Jan. 4, 19

8 Jobs—Male Interest

**ENGINEER**

...ing, steam hospital industry recruit... ...ment for chief facilities, steam ... ...knowledge, degree. Salary $12,... ...Fee paid.
MEDICAL HOSPITAL PLACEMENT
Bureau Employment Agency
...Fifth Ave., Oakland ...

**PERSONNEL TRAINING CO-ORDINATOR**

Personnel Dept needs director ... ...relations to improve training ... ...in service education and ... ...Salary depending on experience. ...
MEDICAL HOSPITAL PLACEMENT
Bureau Employment Agency
...Fifth Ave.

8 Male-Female Help

**LAB CLINICAL**

...B.S. Degree Med. Chem. and ... ...with emphasis in chemis... ...of bac... ...for laboratory and ... ...position. Salary $300 mon...
MEDICAL HOSPITAL PLACEMENT
Bureau Employment Agency
...Fifth Ave., Oakland ...

**RESEARCH**

College chem. background necessary ... ...to train for research project in ... ...laboratory with chief. Work for ... ...medical research. Experienced ... ...positions. Salary open according to ...
MEDICAL HOSPITAL PLACEMENT
Bureau Employment Agency
...Fifth Ave., Oakland ...

**SOCIAL WORKER**

...ARMY
...Female, applicant to train as ... ...assistant, preferably employed ... ...who can secure ... ...to ... ...including those interested in ... ...Graduates, Penn and. Salary ... ...to $3,...
MEDICAL HOSPITAL PLACEMENT
Bureau Employment Agency
...Fifth Ave., Oakland ...

**Social Work Supervisor**

M.S.W.
...Excellent background ... ...supervising ... ...agency ... ...Salary $... ...to $...
MEDICAL HOSPITAL PLACEMENT
Bureau Employment Agency
...Fifth Ave., Oakland ...

8 Jobs—Female Interest

**CLERK**

...Good ... ...shorthand ... ...dictaphone ... ...personal ... ...Light ... ...
MEDICAL HOSPITAL PLACEMENT
Bureau Employment Agency
...Fifth Ave., Oakland ...

**Dir. of Nursing**

FEE PAID
...ing ... ...ability to meet ... ...knowledge of ... ...service ... ...the ... ...Work ... ...ing ... ...Duties ... ...to ... ...Salary ... ...to $...
MEDICAL HOSPITAL PLACEMENT
Bureau Employment Agency
...Fifth Ave., Oakland ...

**Executive Secretary**

...for ... ...young ... ...in ... ...Salary ... ...to $...
MEDICAL HOSPITAL PLACEMENT
...Fifth Ave., Oakland ...

**NURSES**

...Part ...
...3 to 11 p.m. for ... ...facility ... ...supervision ... ...of ... ...Part-time ... ...evenings, ... ...$22 ... ...
MEDICAL HOSPITAL PLACEMENT
Bureau Employment Agency
...Fifth Ave., Oakland ...

**SURGICAL TECH**

...Two ... ...Private ... ...open ... ...Fee ... ...pd. ... ...hours ... ...to ... ...
MEDICAL HOSPITAL PLACEMENT
Bureau Employment Agency
...Fifth Ave., Oakland ...

**TYPISTS**

...Secretary ... ...position ... ...to work ... ...promoting ... ...Typing ... ...Stenography ... ...to ... ...hours ... ...to ... ...
MEDICAL HOSPITAL PLACEMENT
Bureau Employment Agency
...Fifth Ave., Oakland ...

Average for M/F
$ 16,000

Average for M/F
$ 12,000

Average for ...
$ 8,500

*Complainant's Exhibit No. 1.*

SALES CONSULTANTS Clark Bldg.



Pittsburgh Press, Sunday, January 4, 1970—

SALES

WANTED!
ALIVE!
Sales Talent

NO CONTRACTS
NO FEES

$7800-$30,000

MOST POSITIONS OFFER COMPANY CAR AND/OR EXPENSE ACCOUNTS.

A RECENT APPLICANT SAID "I'VE TRIED AN EMPLOYMENT AGENCY BUT THIS IS THE FIRST TIME I'VE BEEN INTERVIEWED BY SOMEONE WHO REALLY UNDERSTANDS MY SERVICE."

ACCOUNT EXECUTIVE—$25,000+ EXCELLENT FUTURE. AGGRESSIVE, PRESTIGE FIRM. LOOKING FOR A YOUNG MAN YOUR POSITION SEARCH.

HOSP.-MEDICAL
Do you like working for a company that offers you a challenging, growth oriented, future? Would you like to be associated with a company that is known for its fine reputation in the community? Contact us and learn more about this opportunity. PAUL YEAGER.

FOOD-GROCERY PRODUCTS
Outstanding job opening in planning & control for food manufacturer. Some experience necessary. Salary open. Excellent benefits. Write for more information. Contact RICK JOHNSTON.

OFFICE PRODUCTS—$20K
Our clients need men with good experience. Let us help you find the right solution to the problems. Salary commensurate with ability. Call us today for confidential interview. Contact Mr. BRADLEY.

MECHANICAL—INDUSTRIAL
Our clients want to start the new year with new people. If you are ready for a change, if you are ready to accomplish, call us today. Contact Mr. DALY or Mr. MARTIN.

CHEMICALS—PLASTICS
If you're one heck of a man with chemical sales experience in laundry compounding, polish compounds or the chemical process industry, & really want to be a "big fish in a big pond" you've found it. Call today. Contact JOHN STACKPOLE.

ELECTRICAL ELECTRONIC
Excellent opportunity exists for sale of component components to users & resale. Need aggressive, experienced man. Salary open, plus bonus, profit sharing, car & full fringes. Call or write in confidence. Contact BILL POWELL in Washington.

PACKAGING
PACKAGING MACHINERY
You are particularly invited to write your resume within the packaging field. Management point here is variety of items. Your contact will be executive. Call or write today. Contact BILL POWELL.

CONSUMER PRODUCTS
Outstanding opportunity for sales of cosmetics, health, toys & sporting commodities. Experience in food, drug, cosmetics. Get in touch with PAUL YEAGER.

SALES
CONSULTANTS
281-6900
2206 CLARK BLDG.
717 LIBERTY AVE.
Employment Service

Average for men
$19,000

TOWNE Jenkins Arcade The Pittsburgh Press, Sunday, January 4, 1970—

8 Jobs—Female Interest

**BEGINNING TYPIST**
**NO EXPERIENCE NECESSARY**

Great opportunity to get in on the ground floor of this fast growing local company. Typing, light office duties, pleasant surroundings. Call Mr. [illegible] Towne Employment Agency, 3207 Jenkins Arcade Bldg.

**GAL FRIDAY**

Small amount of typing, shorthand & a pleasant personality are the requirements to fill this opening in a local company. Call Today. Towne Employment Agency, 3207 Jenkins Arcade Bldg.

**GENERAL OFFICE (2)**

Many job applications of general office duties including accounts receivable, typing & filing. Towne Employment Agency, 3207 Jenkins Arcade Bldg.

**GIRL FRIDAY SECRETARY**

Downtown firm needs a young woman to take charge of phones, light typing & shorthand required. Top salary & benefits. Towne Employment Agency, 3207 Jenkins Arcade Bldg.

**RADIO SALES SECY.**
**FEE NEGOTIABLE**

Downtown radio station is looking for a top notch secretary to generally assist salesmen in presentations and planning. Considerable public contact. Typing and shorthand desired. Salary is commensurate to experience. Call Today. Towne Employment Agency, 3207 Jenkins Arcade Bldg. 391-4290.

**RECEPT. TYPIST**
**FEE NEGOTIABLE**

New downtown firm needs a young person with good typing for light receptionist & typing duties. Great opportunity. Towne Employment Agency, 3207 Jenkins Arcade Bldg. 391-4290.

# COMPLAINANT'S EXHIBIT NO. 2.

Pittsburgh Press, Sunday, Jan. 4, 1970

C#2

3 Jobs—Male Interest

Professional Placement Specialists

Average for Men

$13,000

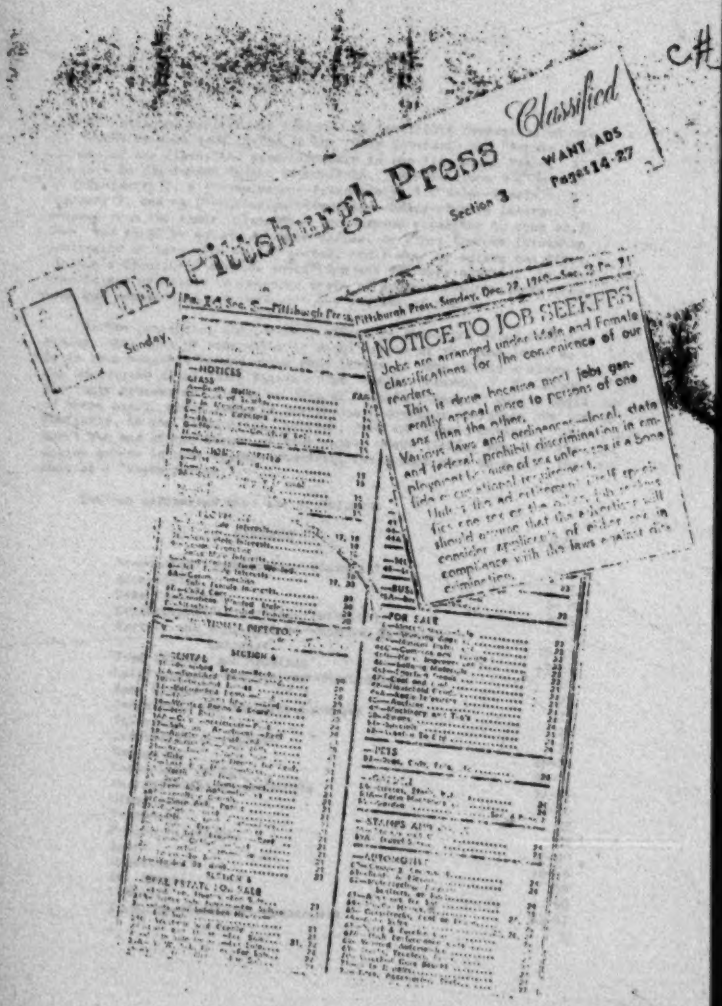
4 Jobs—Female Interest

KEYPUNCH

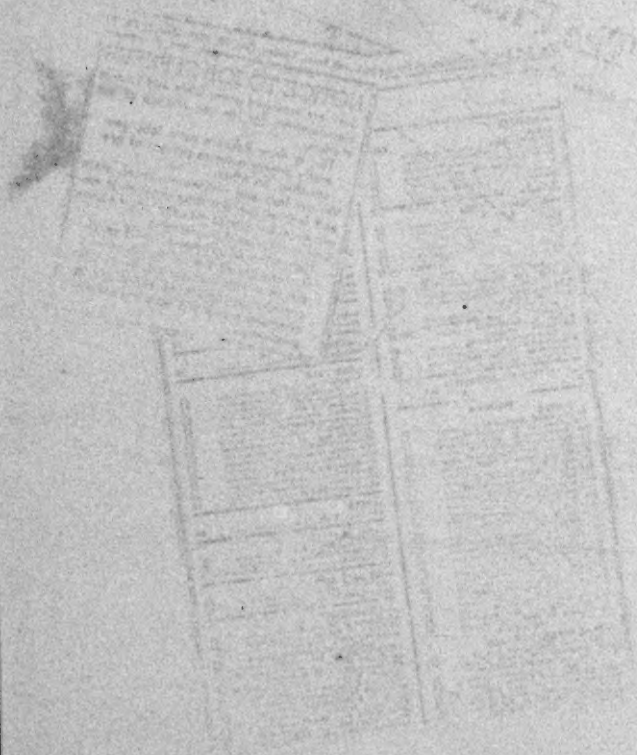
Average for Women

$ 3000

**COMPLAINANT'S EXHIBIT NO. 3.**



COMPLAINANT'S EXHIBIT NO. 3.



# *Complainant's Exhibit No. 3.*

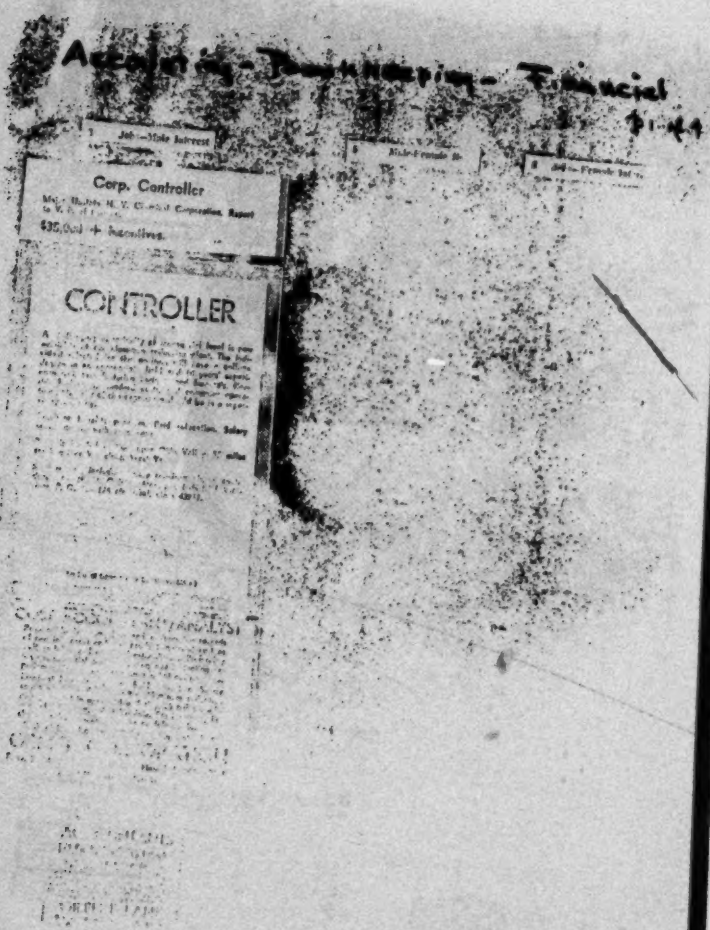
The attached exhibit was prepared to facilitate comparison of sal... job levels between jobs listed in the "Male Interest" and "Female Inter... columns of the classified advertisements in the Pittsburgh Press. Al... listings in the Sunday Press, December 28, 1969--Sections 3 ("Male In... 3A ("Engineers"), 4 ("Commission--Franchise"), 5 ("Male--Female"), 6 ... Interest"), and 6A ("Commission--Franchise--Sales--Female Interest")... removed from the paper, classified into groups according to type or f... work, and rated by salary, when specified, or other factors (probable ...stige, similarity to jobs with salary stated, etc.) when no salary was given. ...ly "Season's Greetings" ads not specifying any job were omitted. In som... ...s, when it was necessary to separate parts of agency advertisements, the ... ...v name was removed and not used with any portion of the ad.

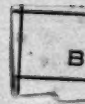
Within categories the ads were placed in descending order of sala... status, with jobs of approximately equal salary at the same level on ... ...e. It is thus possible to determine what levels of jobs within a given f... are advertised as of "Male Interest" or "Female Interest." For examp... ...s the "Data Processing" field, no jobs of "female interest" appear until ... ...of three pages, where computer and keypunch operator positions are loc... ...Similarly, in the "Accounting" section, jobs of "Female Interest" do n... appe... until the end of the second of four pages, where similar ads from the ... agency appear in both columns--however, the female must be a CPA; the ... must be a "sharp person."

The job categories used are as follows:

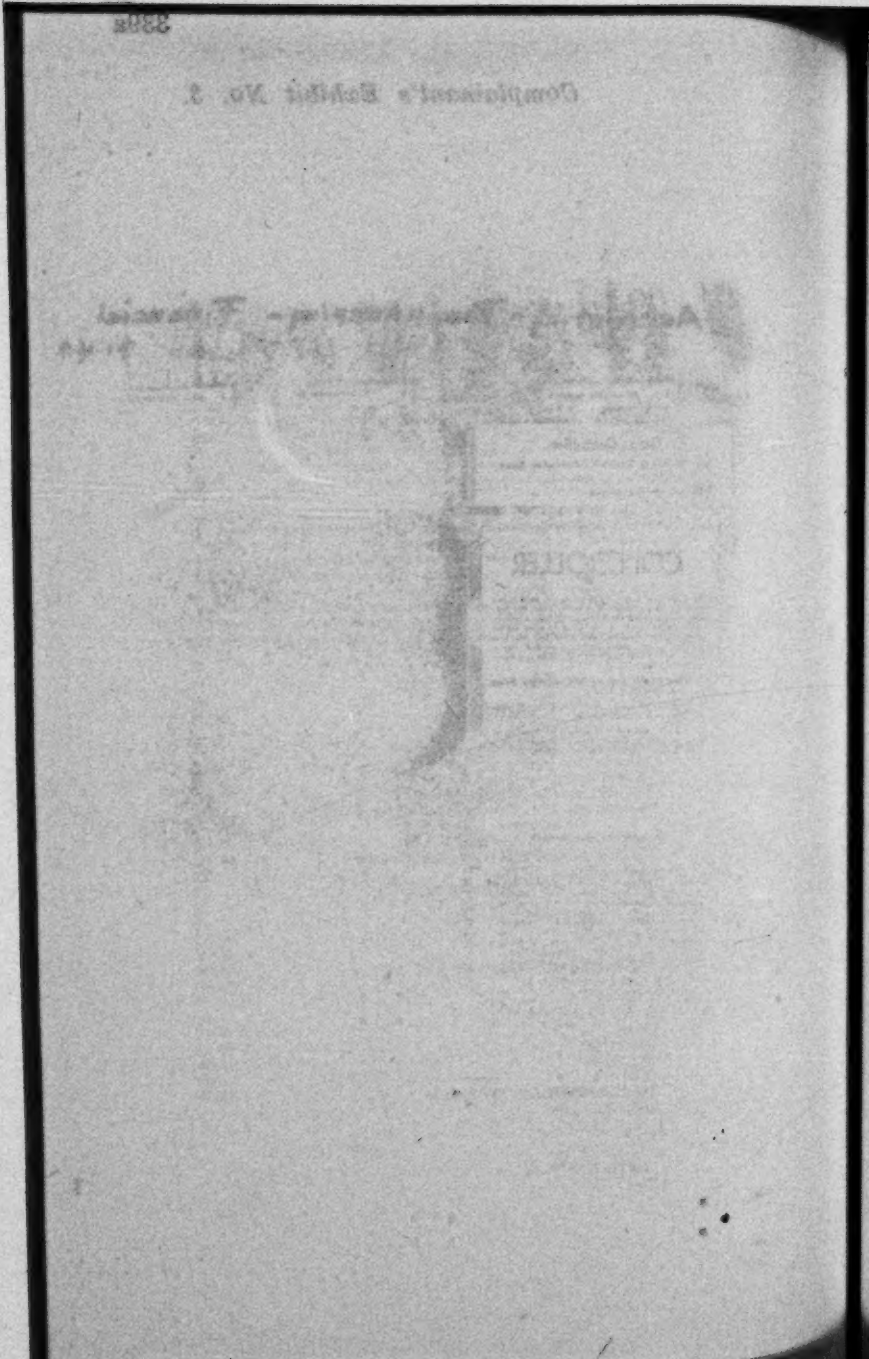
| CATEGORY | PAGES |
|---|---|
| Accounting--Bookkeeping--Financial | 1- 4 |
| Advertising | 5 |
| Data Processing | 6- 8 |
| Engineering--Scientific--Technical | 9-15 |
| Factory and Shop Workers--Machine Operators--Laborers | 15-18 |
| Food Service and Handling | 19-20 |
| Hairdressers--Beauticians--Manicurists | 21 |
| Home Services | 22 |
| Industrial and Business Services | 23 |
| Insurance | 24 |
| Investigators--Guards | 25 |
| Management | 26-29 |
| Mechanics--Repair | 30-31 |
| Medical--Dental--Hospitals | 32-34 |
| Miscellaneous | 35-36 |
| Personnel | 37 |
| Public Relations | 38 |
| Sales | 39-48 |
| Secretarial | 49-58 |
| Sex Appeal | 59 |
| Teachers | 60 |
| Trucking--Delivery--Messengers | 61-62 |

*Complainant's Exhibit No. 3.*

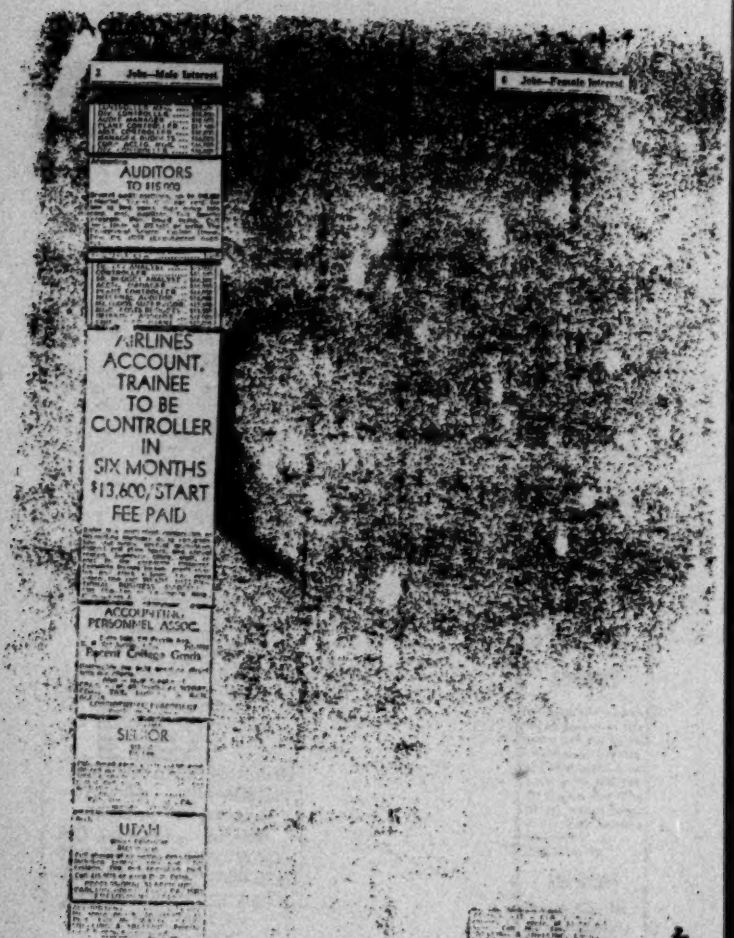


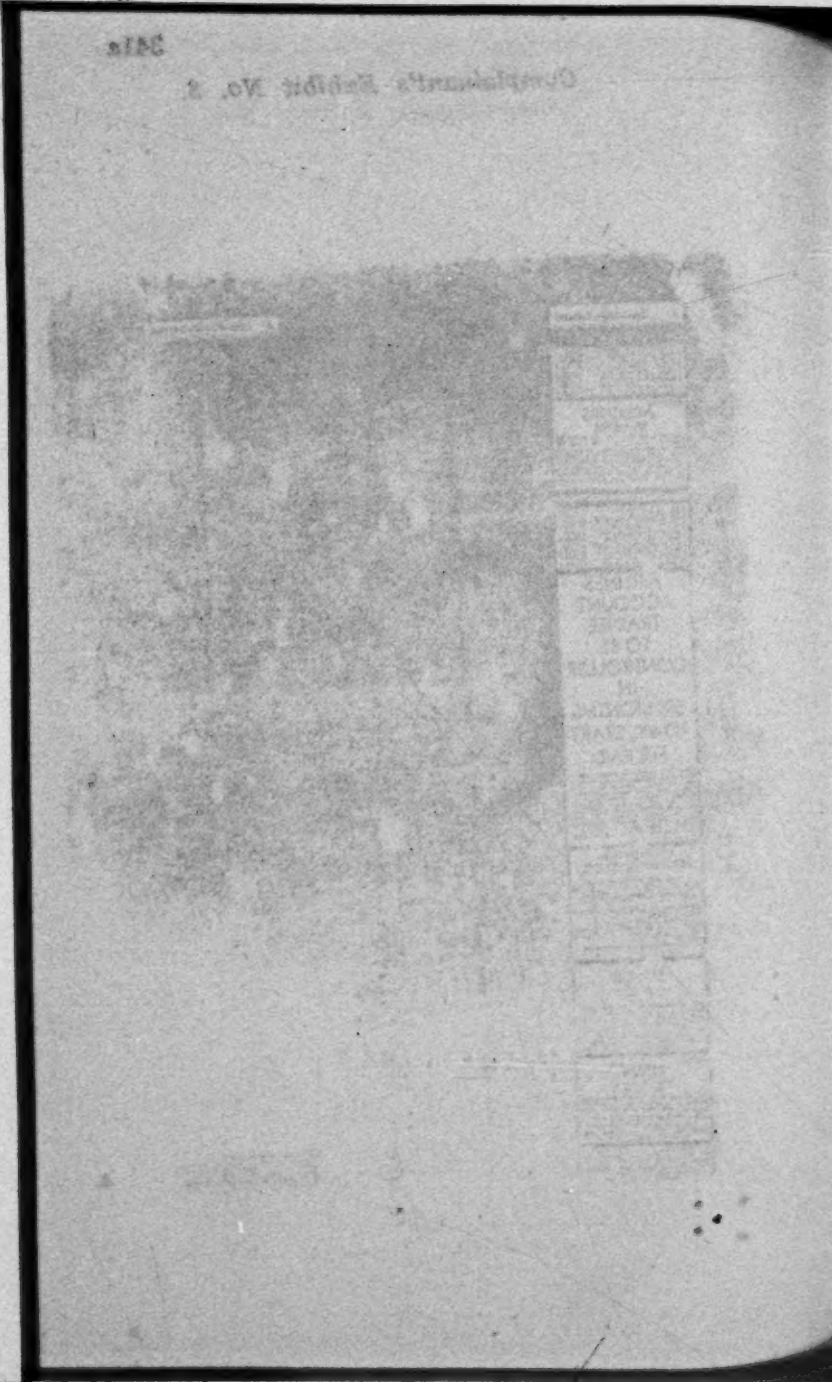


URRED PAGES



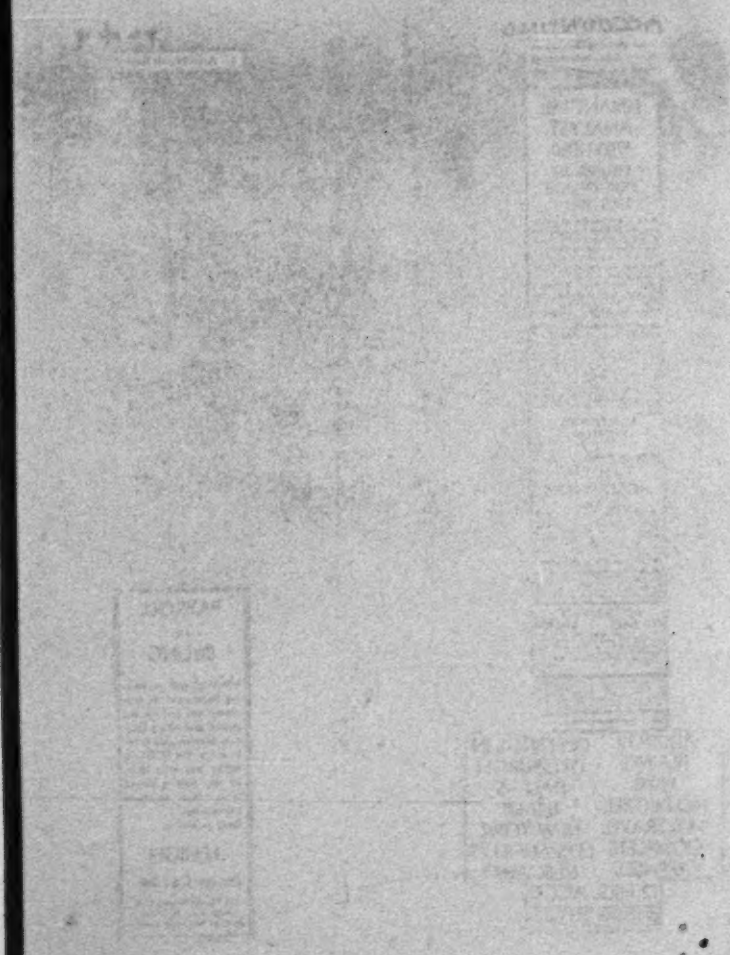
*Complainant's Exhibit No. 3.*



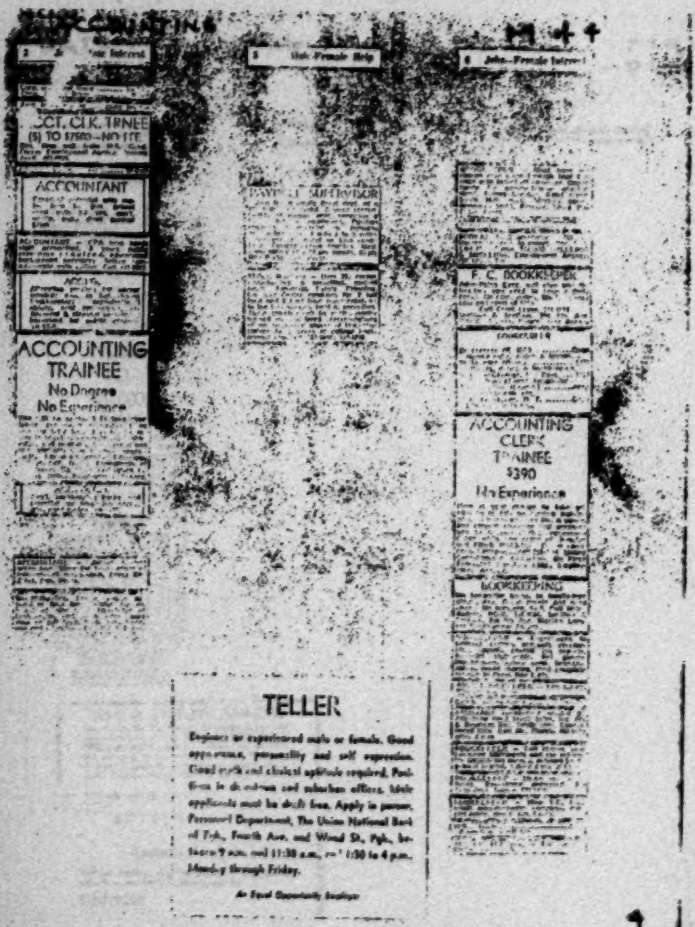


## *Complainant's Exhibit No. 3.*

Complainant's Exhibit No. 8.



*Complainant's Exhibit No. 3.*



ACCOUNTING

SCT. CLK. TRNEE
($) TO $7500—NO FEE

ACCOUNTANT

ACCOUNTING
TRAINEE
No Degree
No Experience

F. C. BOOKKEEPER

ACCOUNTING
CLERK
TRAINEE
$390
No Experience

BOOKKEEPING

TELLER

Beginner or experienced male or female. Good appearance, personality and self expression. Good math and clerical aptitude required. Positions in downtown and suburban offices. Male applicants must be draft free. Apply in person, Personnel Department, The Union National Bank of York, Fourth Ave. and Wood St., 9th, between 9 a.m. and 11:30 a.m., or 1:30 to 4 p.m., Monday through Friday.

An Equal Opportunity Employer

*Complainant's Exhibit No. 3.*

DATA PROCESSING

Pick
Pick

Jobs—Male Interest | Male-Female Help | Jobs—Female Interest

SYSTEMS CONSULTANT
$15,000
TO
$20,000
LOCAL

SYSTEMS
$12,000 to $25,000

GILBERT LANE

SENIOR SYSTEMS ANALYST

Systems Analyst
$15-$20,000

6

*Complainant's Exhibit No. 8.*

DAT. PROCESSING

p.2 of 3

2 Jobs—Male Interest

3 Male-Female Help

3 Jobs—Female Interest

SYSTEMS ANALYSTS $12 TO $20K

COMPUTER CAREER CENTER

D. P. SYSTEMS

PROGRAMMER BROADEN YOUR EXPERIENCE $1,400 FEE PAID

7

*Complainant's Exhibit No. 3.*

DATA PROCESSING

P. 343

COBOL Programmers

PROGRAMMER

COMPUTER OPRS.

KEYPUNCH OPERATOR

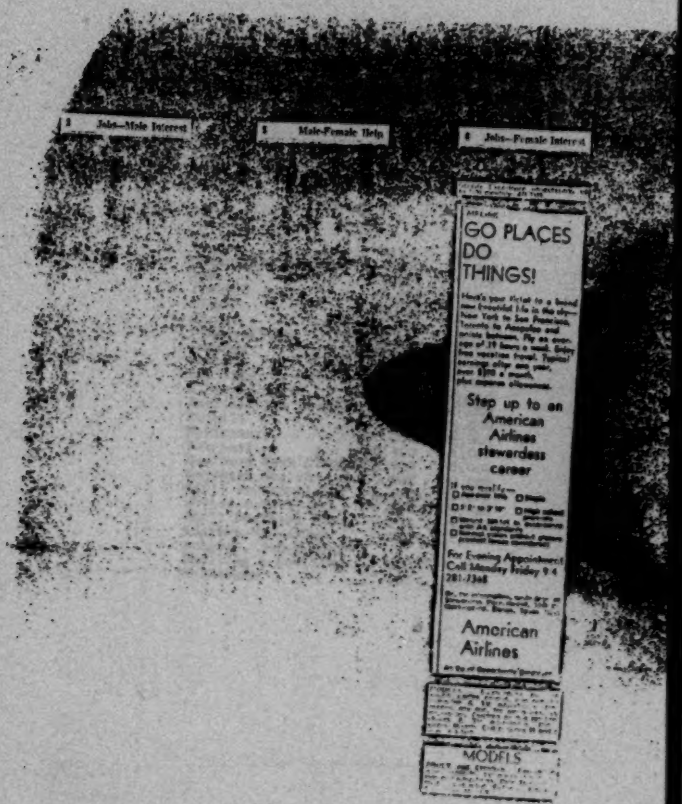
BAILEY

Keypunch Operator

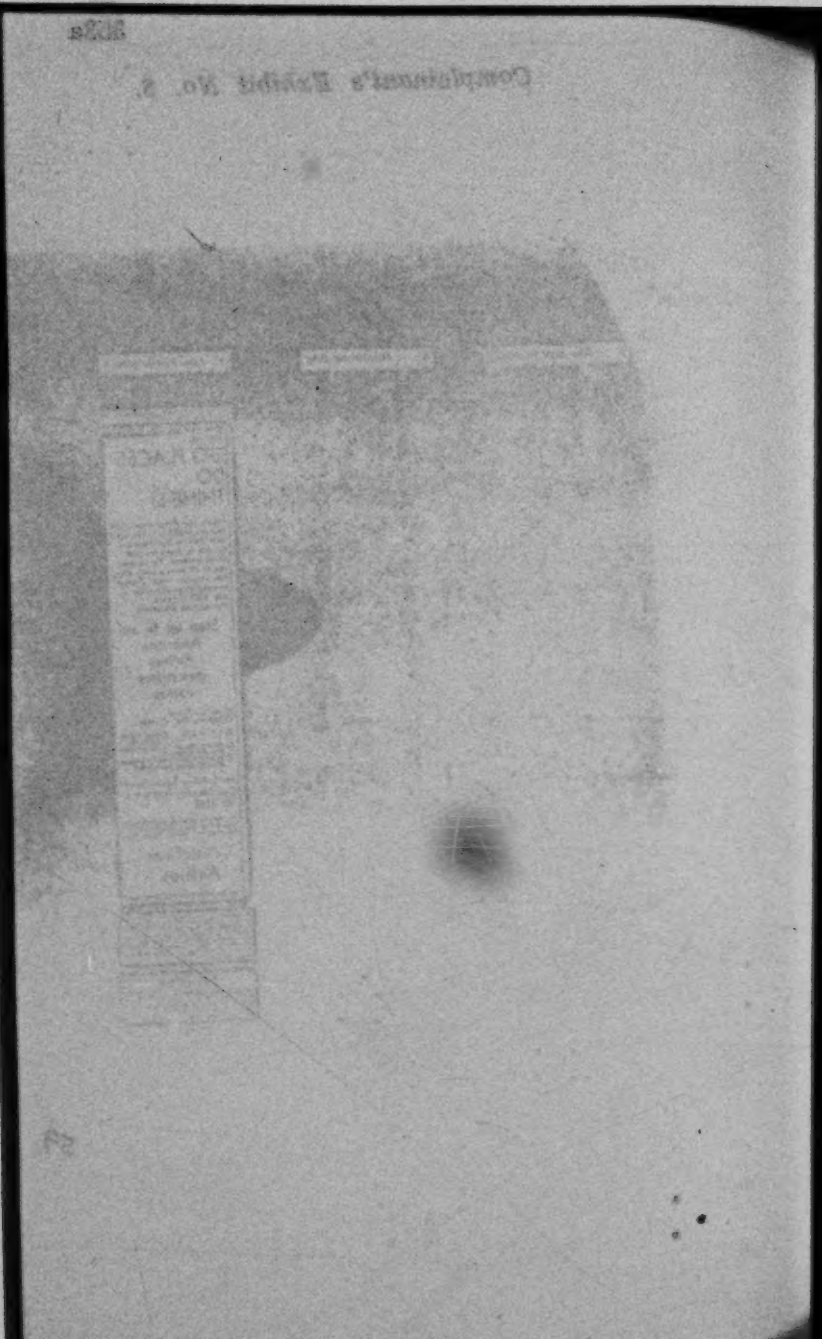
KEYPUNCH OPERATOR

Keypunch Operators

*Complainant's Exhibit No. 3.*




59



# COMPLAINANT'S EXHIBIT NO. 4.

C #4

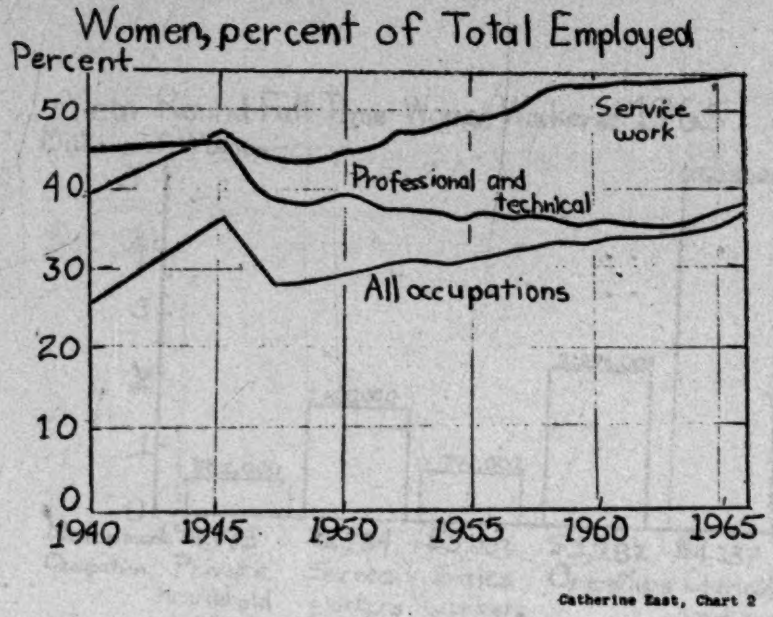
| | Male | Female |
|---|---|---|
| Consultant Service | $14,000 | $5,000 |
| EMR | 14,000 | 5,000 |
| Pyramid | 14,000 | 5,000 |
| Liken | 14,000 | 4,000 |
| Career | 12,000 | 10,000 |
| Cosmopolitan | 12,000 | 6,000 |
| Strauss | 12,000 | 5,000 |
| Beech | 11,000 | 5,000 |
| Emp Spec | 11,000 | 5,000 |
| Rittenhouse | 11,000 | 5,000 |
| American Bus Centr | 10,000 | 6,000 |
| Dunhill | 10,000 | 5,000 |
| Montgomery | 10,000 | 5,000 |
| Pancoast | 10,000 | 4,000 |
| Business Menb Clrghs | 9,000 | 6,000 |
| Computer Search | 9,000 | 6,000 |
| Nat'l Personnel Sys | 9,000 | 5,000 |
| United Consultants | 9,000 | 5,000 |
| Int'l Business Assoc | 9,000 | 4,500 |
| Kearney-McDonough | 8,000 | 4,000 |
| Pongras, S-H-S, and Snelling & Snelling | 7,000 | 5,000 |
| McPherson | 7,000 | 4,000 |

Gerald Gardner
Chart 1

COMPLAINANT'S EXHIBIT NO. 4.

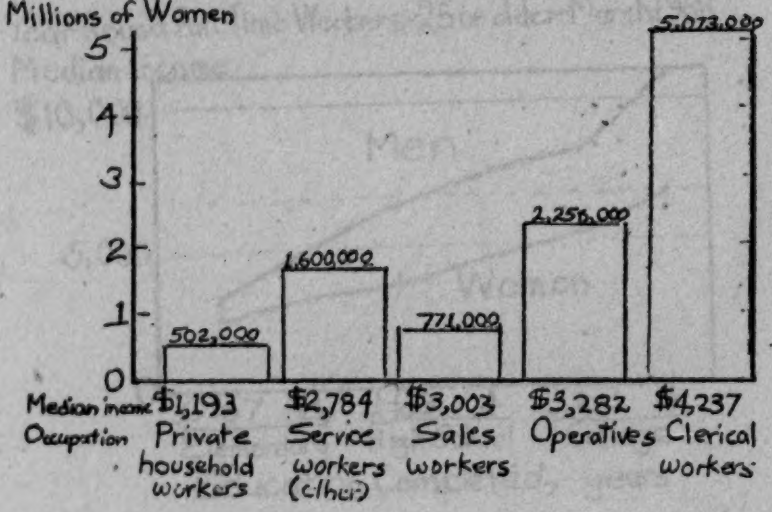
*Complainant's Exhibit No. 4.*

WHITE MEN
NONWHITE MEN
NONWHITE WOMEN
5000
4000
3000




Complainant's Exhibit No. 4.

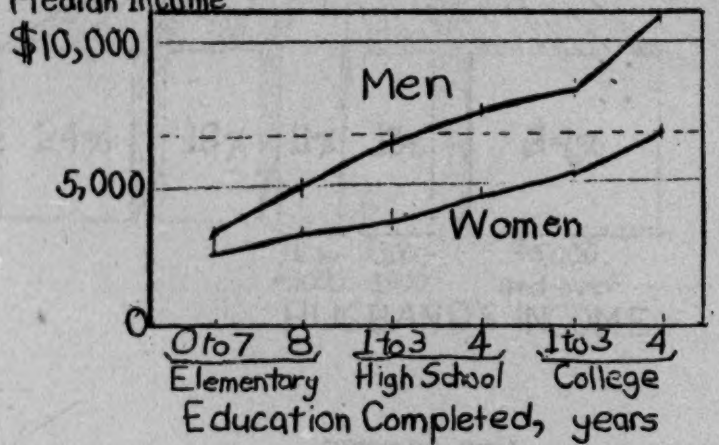
# Year-Round Full-Time Women Workers-1965




Catherine East, Chart 3

Compliance Report No. 4

Year-Round Full-Time Workers-25 or older-March 1968




Catherine East, Chart 4

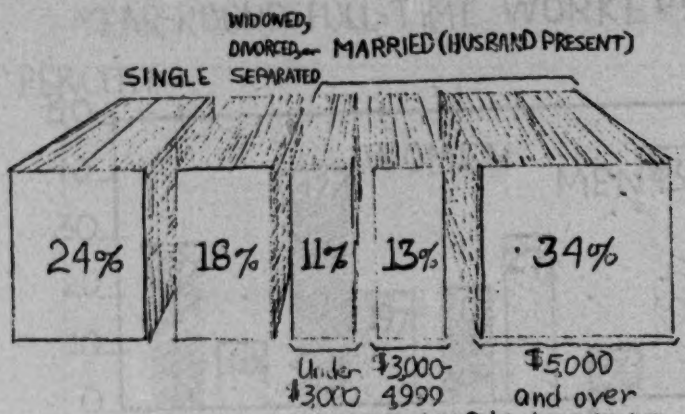
Complainant's Exhibit No. 4.

3058

Complainant's Exhibit No. 4.

Year-Round Full-Time Workers—25th-Median-75th
Median Income
$10,000
5,000
0
Men
Women
Over 8 years of elementary school
1 to 3 years of high school
4 years of high school
1 to 3 years of college
4 years or more of college
Education Completed, Years

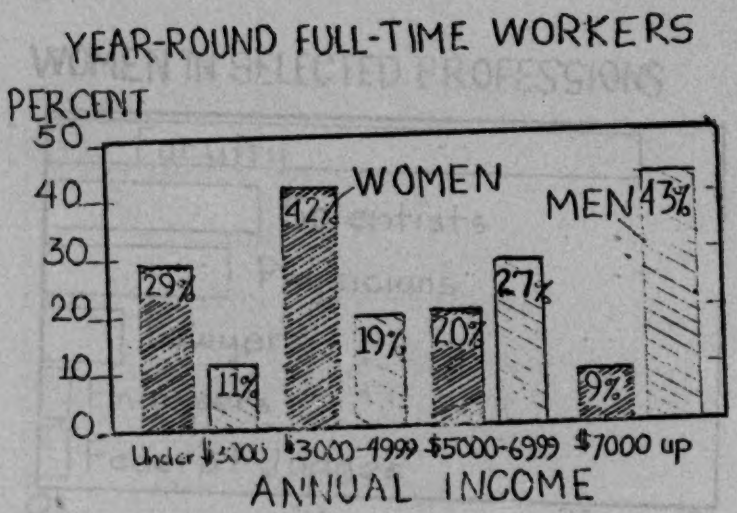
# WOMEN WITH WORK EXPERIENCE IN 1965




Catherine East, Chart 5

Complainant's Exhibit No. 4.

365a




Catherine East, Chart 6

Complainant's Exhibit No. 4

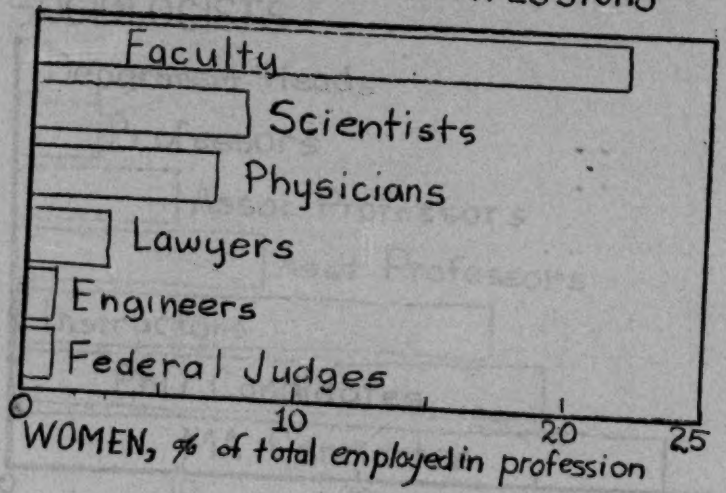
AVERAGE HOURLY TRAFFIC COUNTS AT MARKET ST.

MEN

WOMEN

0 10 20 30 40 50

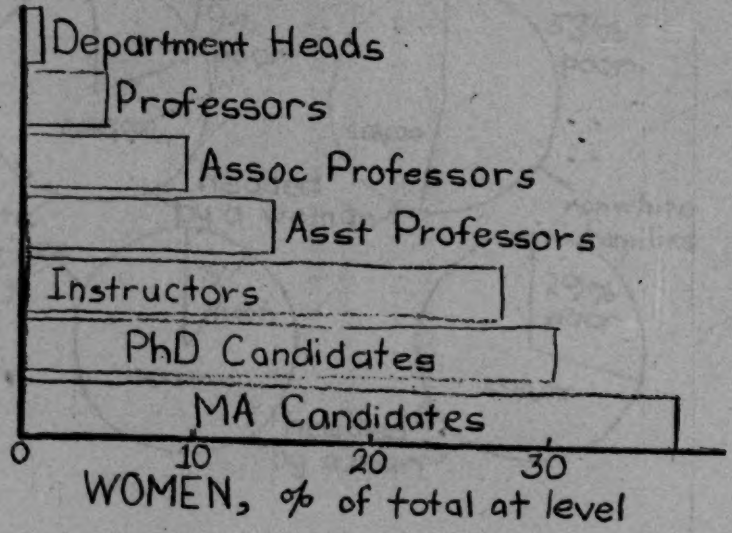
# WOMEN IN SELECTED PROFESSIONS




Catherine East, Chart 7

Complainant's Exhibit No. 4. 369a

WORKFLOW SELECTED PROCESSORS
Control
Statistics
Applications
Runners
Log Users
Testing Nodes
0
50
75
WORKFLOW of 3 processors with multiple instances




Catherine East, Chart 8

Complainant's Exhibit No. 4.

Complainant's Exhibit No. 4

SOCIOLOGISTS

Department Heads

Professors

Assoc. Professors

Asst. Professors

Inst. Lectors

Ph.D. Candidates

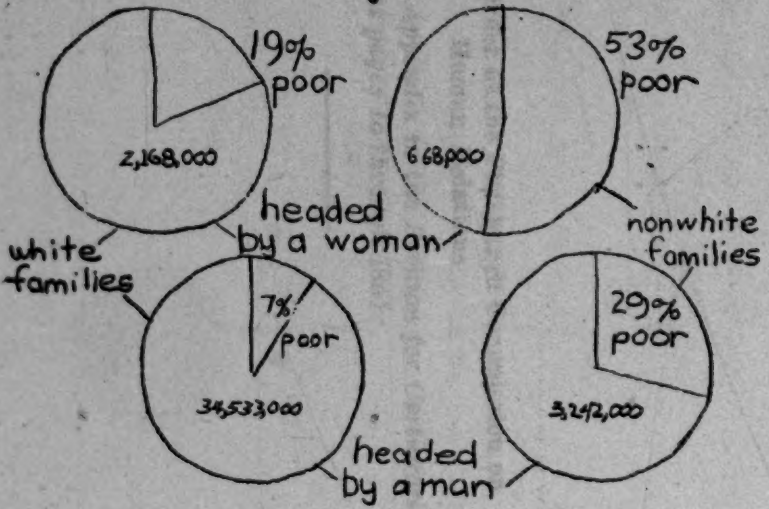
MA. Candidates

WOMEN

20

20

% of total staff




Catherine East, Chart 9

Complainant's Exhibit No. 4.

Complainant's Exhibit No. 4

Families headed by a worker-1969

**Decision and Order of the Pittsburgh Commission on Human Relations**

***(Printed in the Appendix to the Petition for Certiorari at pages 1a through 18a)***

**Opinion and Order of the Court of Common Pleas of Allegheny County, Pennsylvania**

*(Printed in the Appendix to the Petition for Certiorari at pages 19a through 45a)*

**Opinion and Order of the Commonwealth Court of Pennsylvania**

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

PITTSBURGH PRESS COMPANY,
Appellant
v.
THE NATIONAL COMMISSION ON HUMAN RELATIONS, and CITY OF PITTSBURGH,
Appellee
and
THE NATIONAL ORGANIZATION FOR WOMEN, INC.,
Intervenor-Appellee
and
THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,
Amicus Curiae

No. 315 C. D. 1971

Before:

HONORABLE JAMES S. BOWMAN, President Judge
HONORABLE JAMES C. CRUMLISH, JR., Judge
HONORABLE HARRY A. KRAMER, Judge
HONORABLE ROY WILKINSON, JR., Judge
HONORABLE LOUIS L. MANDERINO, Judge
HONORABLE GLENN E. MENCER, Judge
HONORABLE THEODORE O. ROGERS, Judge

Argued: October 20, 1971

Judge Manderino did not participate in the decision of this case.

## Opinion

OPINION BY JUDGE KRAMER January 27, 1972

This is an appeal from an Order of the Court of Common Pleas of Allegheny County dated March 24, 1971, affirming an Order of the Pittsburgh Commission on Human Relations (Commission), appellee, dated July 23, 1970. This Order found the Pittsburgh Press Company (Pittsburgh Press), appellant, to be in violation of the Human Relations Ordinance of the City of Pittsburgh and ordered the utilization of a "classification system of employment advertisement with no reference to sex."

This case was commenced on October 9, 1969, when the National Organization for Women (N.O.W.) filed a complaint with the Commission charging the Pittsburgh Press with "deliberate and constant violations" of Section 8(j) of Ordinance No. 75, enacted into law by the Council of the City of Pittsburgh on February 27, 1967, and as amended by Ordinance No. 395*, approved July 8, 1969. After a conference with the parties, the Commission, on November 3, 1969, found that "probable cause" existed to support the filing of the complaint, and a public hearing was directed to be held. On January 6, 1970, the Pittsburgh Press filed its answer to the complaint, and hearings were held before the Commission on four days during January and February 1970.

The Human Relations Ordinance has been upheld as a valid enactment of the City of Pittsburgh within the authority confered upon the City by the Act of

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*"This amendment added the word "sex" to the list of protected classes.

March 7, 1901, P.L. 20, Article XIX, Section 3, Clause XLIII, 53 P.S. 23158. *See City of Pittsburgh v. Plumbers' Local Union No. 27,* 113 PLJ 7, (1965); *Stanton Land Company et al. v. City of Pittsburgh,* 111 PLJ 9 (1963). Also *see* Act of October 27, 1955, P.L. 744, Section 12.1, as amended, 43 P.S. §961.1.

The "particular" of the complaint of N.O.W. reads as follows:

"The National Organization for Women charges the Pittsburgh Press with deliberate and constant violations of section 8 (j) of the Human Relations Ordinance as amended by Ordinance 395. The National Organization for Women has attempted on several occasions to convince editors and publishers of the Pittsburgh Press that their policy of allowing employers to place advertisements in male or female columns, when the jobs advertised obviously do not have bona fide occupational qualifications or exceptions, is unlawful."

The pertinent provisions of Section 8(j) of the amended ordinance read as follows:

"It shall be unlawful practice . . . except where based upon a bona fide occupational exemption certified by the Commission in accordance with Section 7, subsection (d) of this ordinance: . . .

"(j) for any person, whether or not an employer, employment agency or labor organization, to *aid,* incite, compel, coerce or participate in the doing of any act declared to be an unlawful employment practice by this ordinance, or to obstruct or prevent any person from enforcing or complying with the provisions of this ordinance, or any rule, regu-

lation or order of the Commission, or to attempt directly or indirectly to commit any act declared by this ordinance to be an unlawful employment practice." (Emphasis added)

Section 8 (e) of the amended ordinance declares it to be an unlawful employment practice:

"(e) for any employer, employment agency, or labor organization to publish or circulate, or to cause to be published or circulated, any notice or advertisement relating to employment or membership which indicates any discrimination because of race, color, religion, ancestry, national origin or place of birth, or sex."

Section 7 (d), mentioned in Section 8 (j) above, reads:

"The Commission shall have the power and it shall be its duty to:

"(d) Certify upon the request of any person that a particular occupation or position is exempt from the provisions of this ordinance relating to unlawful employment practices if the Commission finds that the occupation or position reasonably requires the employment of a person or persons of a particular race, color, religion, ancestry, national origin or place of birth, or sex and that such certification is not sought as means of circumventing the spirit and purpose of this ordinance, the burden of proving the facts required for such a finding to be in each instance upon the person requesting the certification of exemption from the provisions of this ordinance."

We should also point out that under definitions in Section 4 of the Ordinance, we find:

"(b) Discriminate and discrimination — The terms 'discriminate' and 'discrimination' include any difference in treatment based on race, color, religion, ancestry, national origin, place of birth, or sex."

The record in this case clearly shows that the Pittsburgh Press has attempted to eliminate discriminatory employment advertising on the basis of sex and thereby achieve the goals of the Ordinance. Illustrative of this attempt are references in the record to changes already made in its advertising column headings and efforts to eliminate the terms "male" and "female" in the body of employment advertising ads. These changes were effected through negotiation and conference with the Commission. The record indicates an intent and desire on the part of the Pittsburgh Press to cooperate with the Commission in eliminating discriminatory wording in employment advertising. This certainly is commendable and to be expected of the Pittsburgh Press in light of its role as one of the nation's leading civil rights advocates in both word and deed.

The complaint of N.O.W., and this opinion, are restricted to alleged discrimination found in employment advertising column headings. The specific wording of the employment advertising column headings which are at issue in this case are three, namely, "Jobs — Female Interest", "Jobs — Male Interest" and "Male — Female Help."

In view of the fact that the court below did not take any additional testimony or receive any additional evidence, the scope of review of this Court is to deter-

mine whether or not the Commission abused its discretion or committed an error of law. *Gabriele v. Boeing Co., Vertol Division,* 1 Pa. Commonwealth Ct. 96, 99, 272 A. 2d 527, 529 (1971), *Romain v. Middletown Area School District,* 1 Pa. Commonwealth Ct. 419, 421, 275 A. 2d 400 (1971).

It should be pointed out that the record also indicates that the Pittsburgh Press publishes, what was termed in the record as, a "disclaimer" at the beginning of the male and female interest want ads, which reads as follows:

> "Notice to job seekers. Jobs are arranged under male and female classifications for the convenience of our readers. This is done because most jobs generally appeal more to persons of one sex than the other. Various laws and ordinances — local, state, and federal, prohibit discrimination in employment because of sex, unless sex is a bona fide occupational requirement. Unless the advertisement itself specifies one sex or the other, job seekers should assume that the advertiser will consider applicants of either sex in compliance with the laws against discrimination."

In its "Decision and Order" the Commission made ten findings of fact which, upon our review of the record, are supported by substantial evidence. The Commission and the court below concluded that in its employment advertising the Pittsburgh Press was aiding employers in discriminating against women through the use of the above-noted column headings, and therefore was engaged in an unlawful employment practice violative of Section 8(j) of the Ordinance.

The lower court, in a lengthy opinion, affirmed the findings of fact and conclusions of law made by the Commission and directed the Pittsburgh Press to comply with the Commission order on or before May 10, 1971. An appeal was taken to this Court, and we granted the prayer of a petition for a supersedeas, pendente lite. The court below was aided by the participation of a number of amici curiae who filed briefs, two of whom were permitted by this Court, to intervene. Briefs were submitted by the Solicitor of the City of Pittsburgh, on behalf of N.O.W. in support of the Commission's Order, and by the American Newspaper Publishers Association (ANPA) in support of the position of the Pittsburgh Press.

The Pittsburgh Press in its brief raises three issues which we will cover in the following sequence. First, the Pittsburgh Press states that the Commission violated its constitutional rights to due process of law by issuing an adverse order based upon a record devoid of any identified, alleged or proven principal offense. Secondly, the Pittsburgh Press argues that its use of the employment advertisement column headings in question does not constitute discrimination as prohibited by the Ordinance. Lastly, the Pittsburgh Press argues that the scope of the order of the Commission as affirmed by the court below exceeds the scope of the Commission's authority and jurisdiction and that it is too broad in proscribing all reference to male and female, in that the Ordinance itself allows certain exemptions.

## Due Process

The Pittsburgh Press argues that failure on the part of N.O.W. to specifically allege, prove or identify the principal offense of discrimination renders the Com-

mission's Order invalid in that due process of law was not afforded to the Pittsburgh Press.

The Pittsburgh Press is correct in its assertion that due process of law is as equally applicable to administrative proceedings as it is to judicial proceedings. In *W. J. Dillner Transfer Co. v Pennsylvania P.U.C.* at 175 Pa. Superior Ct., 461, 468-69, 107 A. 2d 159 (1954) our Superior Court said:

> "Appellant argues it was not sufficiently appraised of the issue in that the complaint set forth and charged a violation of appellant's authority at Folder 3 of A. 61744, whereas the Commission based its finding on violation particularly on an interpretation of authority granted at Folder 2 of A. 61744. Admittedly the requirement of procedural due process applies to proceedings before administrative tribunals as well as judicial bodies. The question of what constitutes a specific designation of the issue raised or charges made depends upon the violation alleged and the type of investigation being conducted. *Armour Transportation Company v. Pennsylvania P.U.C.*, 138 Pa. Super. 243, 10 A. 2d 86; . . ."

In the *Armour* case, *supra* the court at 249 cited its earlier opinion in *National Automobile Corp. v. Barfod*, 289 Pa. 307, 311 137 A. 601, 602 (1927):

> "The requirement of due process of law, however, applies to administrative as well as to judicial proceedings. The doctrine of notice and hearing thus becomes a more potent force in our land, because it applies to the decisions and acts of administrative officials and, unless there are extraordinary emer-

gencies this essential requisite of due process cannot be dispensed with."

The *Armour* court also said at 250-51:

"There must be due notice and an opportunity to be heard, the procedure must be consistent with the essentials of a fair trial, and the commission must act upon evidence and not arbitrarily. . . . *Railroad Commission v. Pacific Gas & Electric Co.*, 302 U.S. 388, 393, 82 L. ed. 319.' The question of what is proper notice, or, as here, of what constitutes a specific designation of the issue raised or charges made, depends necessarily upon the facts of each case, the type of investigation being conducted, the violations alleged, and the penalty or order sought to be imposed. Where the purpose of the investigation by the Commission is only to determine the reasonableness of rates charged by utility, a different standard would seem to apply than where the franchise of the utility is sought to be revoked for violation of the utility laws and a penalty or fine imposed."

The ingredients of due process have been discussed in a multitude of judicial opinions. A reading of many of these cases confirms our understanding that due process of law is afforded when (1) the "accused" is informed with reasonable certainty of the nature of the accusation lodged against him, (2) he has timely notice and opportunity to answer these charges and to defend against attempted proof of such accusation, and (3) the proceedings are conducted in a fair and impartial manner. The Pittsburgh Press does not contend that it was denied an opportunity to defend itself or that it

was denied an impartial and fair hearing. The Pittsburgh Press does insist, however, that it was denied due process of law insofar as being unable to determine from the complaint the nature of the alleged offense. In *Commonwealth v. Acquaviva,* et al., 187 Pa. Superior Ct. 550, 145 A. 2d 407, 410 (1958) the Superior Court adopted the lower court opinion of Judge Laub in which he stated:

> "It is sufficient if the language used is capable of an interpretation which reveals such essentials. Lack of precision is not itself offensive to the requirement of due process. The constitution does not require impossible standards; all that is required is that the language convey sufficient definite warning as to the prescribed conduct when measured by common understanding and practices. *Roth v. United States,* 354 U. S. 476, 77 Supreme Court 1304, 1 L. E. 2d 1498."

Although this was a criminal case, the principle is applicable here.

This is an administrative proceeding and is not restricted by the niceties of common law pleadings. The Pennsylvania Legislature in its wisdom permitted the establishment of local administrative agencies to process complaints and hold proceedings to adjudicate issues concerning certain rights of citizens. It certainly was within the contemplation of the Legislature that such a local administrative agency would be lay-oriented. It was contemplated, and is indeed the reality, that persons not formally trained in the law often serve as human relations commissioners. Similarly, it was to be expected that the complaints and charges would be framed

in the language of laymen. Administrative agency proceedings have never been held to the high standards of the law suit filed in a court of law. In *Kochinsky v. Independent Pier Company,* at 157 Pa. Superior Ct. 15, 41 A. 2d 409, 410-11 (1945), the court said:

> "Proceedings before the compensation authorities are not 'litigation', and the strict rules of pleading and practice applicable to common law actions do not apply. The courts take a liberal attitude toward the pleadings in compensation cases and consider the substance of the relief prayed for rather than its form. . . . Of Course, the parties are entitled to know the issue in any particular proceeding so that they may be prepared to meet it by proper evidence.

A determination by this Court that the Pittsburgh Press had sufficient knowledge of the charges against it, thus enabling it to properly defend, would be dispositive of the due process of law question in the instant case. We are in agreement with the Pittsburgh Press argument that the "particulars" (required by the Ordinance) as set forth in the original complaint of N.O.W. lacked some specificity. Nevertheless, we hold that the complaint particulars were adequate and sufficiently specific under the test of fairness. We hold that the Pittsburgh Press was properly and adequately informed of the charged violation of Subsection 8(j) of the Pittsburgh Human Relations Ordinance, as amended. The appellant newspaper had notice and knowledge of the charge that it was aiding employers to unlawfully discriminate by the placing of employment advertisements under the arbitrarily segregated male and female columns on the advertising pages of the newspaper.

The Pittsburgh Press was afforded all of the protection required in the proceedings before the Commission, and therefore we hold that the Pittsburgh Press was not denied its constitutional right to due process of law.

Counsel for the Pittsburgh Press further argues that an additional deficiency in the complaint was the lack of any specific incident wherein column segregated employment advertisments resulted in sex discrimination to a particular woman.

The nature of the charge herein filed is discrimination against a class (women). It is well established that when the Legislature proscribes discriminatory acts against a class it is unnecessary for the complaining class representative to allege specific injured parties. *See Pa. Human Relations Commission v. Chester School District,* 427 Pa. 157, 233 A. 2d 290 (1967). If the advertising column headings here are discriminatory, they are in violation of the Ordinance per se, and there need not be a specific "particular" on an actual discrimination suffered by any particular woman. If discriminatory, the column headings were in violation before the first woman actually suffered any act of discrimination.*

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* We note with interest the language of the Pa. Human Relations Commission, Guidelines In Discrimination Because of Sex, Pa. Bulletin No. 24, Vol. 1, p. 707, Dec. 19, 1970, "The placement of an advertisement seeking applicants for employment in a classified advertisement section under 'Help Wanted - Male', or 'Help Wanted - Female Interest' or similar columns with a sex designation is considered to be a violation of §5(b) (2) [Pa. Human Relations Act, Act of July 9, 1969, P.L. 133, 46 P.S. 955] if an employer is covered by the Act and has not received a bona fide occupational qualification exemption from the Commission."

We note here that contrary to the argument of the Pittsburgh Press that the record does not disclose any specific incident of discrimination against any specific woman, a careful reading of the record indicates that one witness did in fact testify to such a result. Her testimony indicated that she responded to an ad placed in the "Jobs - Male Interest" column for a "dishwasher" and was advised by an agent of the employer that he had been given specific instructions not to hire a female for the advertised job. The interesting point is that counsel for the Pittsburgh Press, while arguing that this testimony was irrelevant, admitted on the record that this witness may well have had legitimate grounds upon which to file a complaint before the Commission. In view of the fact that the discriminatory practice came about as a result of an ad placed by the employer and was published in an arbitrarily segregated "male" column, we hold that there was substantial evidence placed in the record to support the charge made by N.O.W.

## Violation of the Ordinance

The Pittsburgh Press argues that its manner of job classification column heading arrangement was selected for the purpose of providing maximum aid to both the advertiser and the job applicant. The Pittsburgh Press insists that this manner of arranging employment advertisements is oriented to the interests of persons seeking employment. The record does not support this contention. The record clearly demonstrates that this sex segregated system of want ad column classification is geared primarily to the interests and desires of employers. The Pittsburgh Press further argues that in the event discriminatory motivations are found on the

part of a particular employer, nevertheless the Pittsburgh Press is exculpated by way of the prior cited "disclaimer".

We have long passed that point in the advancement of civil rights whereby a declaration of intent can be used to screen or defense for actual discrimination. The "separate but equal" principle is no longer a legitimate argument in civil rights cases. We agree with counsel for the Pittsburgh Press when he states, "The purpose of the statute was to prohibit practices which denied job opportunities to individuals because of sex." The Pittsburgh Press cannot frustrate that purpose by a declaration that column headings are arranged for a reader's convenience and that any recourse to be had by women lies against those employers who do in fact discriminate.

The right to work and its concommitant opportunity to achieve economic security and stability are essential to the pursuit of life, liberty and happiness. As early as 1915, the United Sates Supreme Court declared that:

> ". . . the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment [Fourteenth] to secure. *Truax v. Raich,* 239 U.S. 33, 41, 60 L. ed. 131, 135 (1915)."

To anyone who even once has viewed women participating in a roller derby, the argument that all women are the weaker sex, desirous of only the more genteel work, carries little weight. The success of women Jockeys is further evidence of which we can take notice. It is no longer possible to state that all women desire, or have

an "interest" in, any one type or classification of work. Some women have the desire, ability and stamina to do any work that men can do. Once we accept such a premise it then becomes logically impossible to permit continued segregation of employment want ads by column headings for any job coming within the purview of the Ordinance.

The law recognizes few absolutes and the necessity to recognize the legitimate exceptions continues. As a society we continue to recognize the existence of certain differences between men and women and consequently, exceptions permitted under Section 8 of the Ordinance, *supra*, by certification of the Commission are a legitimate and proper method to differentiate, provided that such grants are both reasonable and legal. Any employer having a legitimate need to so advertise may apply for the legislatively recognized exemption. Interestingly, both the Pittsburgh Press and the ANPA agree that in the absence of an exemption, the Pittsburgh Press could not utilize column headings such as "Jobs - Black Interest" or "Jobs - White Interest" or "Jobs - Catholic Interest" or "Jobs - German Interest", etc.

The appellants argue that the discrimination cases are analogous to the "false advertising" cases, wherein the courts have held that a newspaper cannot be held liable for the false advertising of an advertiser. We feel compelled to reject the analogy for the reason that the maintenance of segregated column headings in and of themselves is indicative of a newspaper's participation in an illegal discriminatory scheme. On the other hand, the simple publication of a particular advertisement

later found to be false, without proof of complicity, actual or constructive, casts no shadows of liability onto a newspaper.

This is not a matter of whether the Pittsburgh Press intentially conspired with some employer or employers to discriminate against women. What is of importance is that through the use of its arbitrarily selected column headings the Pittsburgh Press "aids" such employers to discriminate. When the Pittsburgh Press arbitrarily arranges and publishes such column headings it is aiding in sex discrimination. The ruling that employment want ad column headings be written asexually is appropriate because it eliminates the difficulties of evaluating sophisticated medical, sociological, and actuarial theories of aggregate differences between the sexes. It is proper because it represents the highest degree of societal commitment to the ideal of legal sexual equality. Perhaps more importantly, asexual employment advertising column headings will and in guaranteeing women their fundamental right to be hired and judged on the basis of individual characteristics and capabilities.

The Pittsburgh Press and ANPA argue that a distinction exists between sex and other protected classes. To the contrary, we hold that acts of discrimination prohibited by this Ordinance apply *equally* to "any difference in treatment based on race, color, religion, ancestry, national origin, place of birth, or sex".

There is not one word to be found in the Ordinance which could support appellants' argument that discrimination on the basis of sex is to be treated any differently than discrimination in any of the other categories. Sex,

like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth. What differentiates sex from the so-called "nonsuspect statutes", such as intelligence or physical disability, and aligns it with the recognized "suspect" classification (race) is that the characteristic usually bears no relation to ability to perform or contribute to society. The result is that the entire class is abrogated to an inferior legal status without regard to the capabilities or characteristics of its individual members. Women, like blacks have historically labored under legal and social disabilities. Like black citizens, for many years they were denied the right to vote and until recently were unable to serve on juries in many states. Married women in this state were placed in a different position vis-a-vis their property rights. None of these distinctions was based upon legitimate differences. The pedastal upon which history and the law have placed women has evolved into an isolation booth, far removed from the rights afforded the rest of society.

In *Sail'er Inn, Inc., et al. v. Kirby*, 95 Cal. Rptr 329, 334 485, P. 2d 529, 534 (1971), the California Supreme Court refused to uphold legislation designed to protect women in not permitting them to work behind a liquor bar. The Court said:

> "But even if we assume that bartending is more dangerous than waiting on tables, there is no evidence that women bartenders are more likely than male bartenders to suffer injury at the hands of customers. A desire to protect women from the general hazards inherent in many occupations cannot be a valid ground for excluding them from those occupations under Section 18. Women must

be permitted to take their chances along with men when they are otherwise qualified and capable of meeting the requirements of their employment."

In *Weeks v. Southern Bell T. & T. Co.*, 408 F. 2d 228, 236 (1969), the Court stated:

"What does seem clear is that using these class stereotypes denies desirable positions to a great many women perfectly capable of performing the duties involved . . . Moreover, Title VII* rejects just this type of romantic paternalism as unduly Victorian, and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing. We cannot conclude that by including the bona fide occupational qualification exception Congress intended to renege on that promise. . . . The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group. (And at page 235) We conclude that the principle of non-discrimination requires that we hold that in order to rely on the bona fide occupational qualification exception, an employer has the burden of proving that he had reasonable cause to

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*"Title VII" refers to the Civil Rights Act of 1964, 42 U.S.C. 2000 (e)".

believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.

This quotation captures the essence and purpose of this Pittsburgh Ordinance.

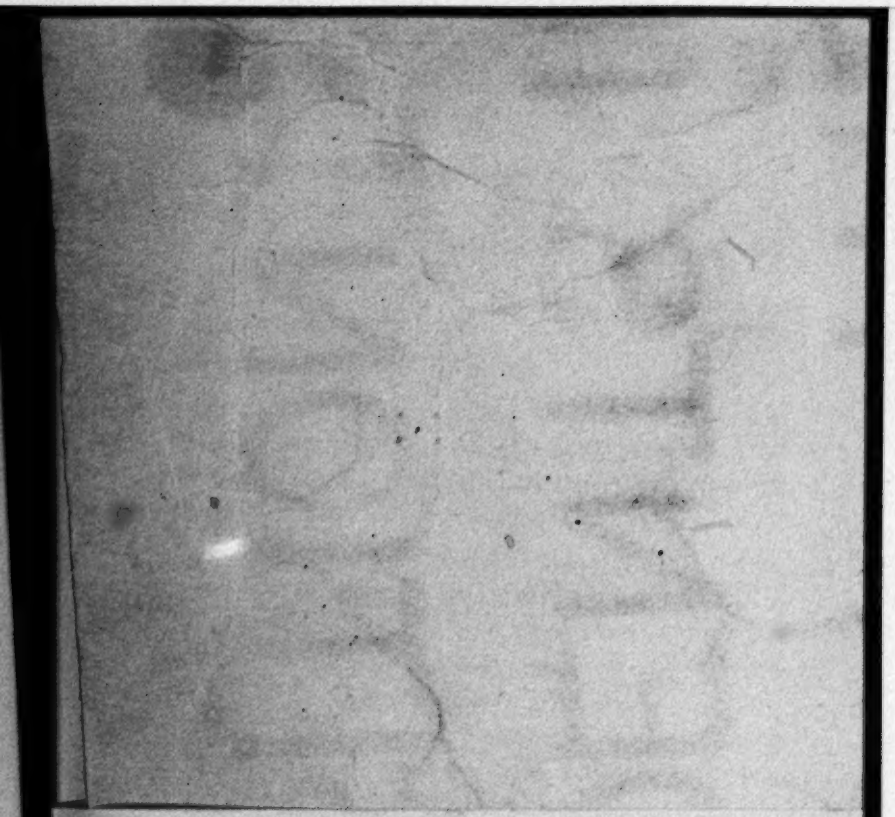
The state of a human being without a job is a neutral fact, equally applicable to both sexes. The finding of a job should also be a neutral fact, equally accessable to both sexes.

In *Richards v. Griffith Rubber Mills,* 300 F. Supp. 338, 340, (D. C. Or. 1969), the United States District Court held that the refusal to hire a qualified woman job applicant could no longer be supported by reliance on a state law and ruled as follows:

". . . Except in rare and justifiable circumstances . . . the law no longer permits either employers or the states to deal with women as a class in relation to employment to their disadvantage. . . . Individuals must be judged as individuals and not on the basis of characteristics generally attributed to racial, religious or sexual groups."

In the case of *Reed v. Reed,* not as yet reported, but handed down by the United States Supreme Court on November 22, 1971, 40 LW 4013, where the Court held unconstitutional those portions of an Idaho statute giving preference to males in the granting of letters of administration in estates, the Court said:

"So long as the law deals only with a characteristic found in all, (or some) women but no men, or in all (or some) men but not in women, it does not



ERRATA

Page 395a, lines 32 through 34; page 396a, lines 1 through 5

Delete quotation from Reed v. Reed; substitute the following:

"By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause."

> ignore individual characteristics found in both sexes in favor of an average based upon one sex. . . . Differences should not be based upon the qualities of male or female but upon the characteristics and abilities of the individual."

We are guided by such pronouncements.

Finally, under this section ANPA also raises the specter of an alleged violation of the newspaper's constitutional right to "freedom of the press". We hold this argument to be non-meritorious. A restriction on discriminatory column headings in employment want ads does not interfere with the editorial policy of the newspaper. There is precedent for the principal that advertising, per se, does not come within the purview of this constitutional right. In the case of *Lorain Journal Company v. U.S.*, 342 U.S. 143, 96 L. ed. 162 (1951), the United States Supreme Court held that an injunction restraining a publisher under the Sherman Anti-trust Act from refusing to accept local advertising from customers using a competitive radio station for the same purpose did not violate the constitutional right of freedom of the press as a prior restraint upon what the newspaper could publish.

In the case of *Kovacs v. Cooper*, 336 U.S. 77, 93 L. ed. 513 (1949), the Court upheld a city ordinance prohibiting sound amplifiers used in public streets, stating that although freedom of speech is given a "preferred position", nevertheless "to enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself." As was pointed out by the United States Supreme Court in the case of *Mutual Film Corp. v. Industrial Commission*, 236 U.S. 230, 59 L. ed. 552,

559 (1915), the underlying safeguard of the constitutional provision for freedom of the press is "that opinion is free and that conduct alone is amenable to the law".

Whether the Pittsburgh Press has a constitutional right to print editorials, or news columns, or byline stories for or against sex discrimination is not the issue before us. What is before us is the question of whether in its advertising business the use of arbitrarily sex-segregated employment want ad column headings by this newspaper "aids" an employer in sex discrimination. The Commission and the court below concluded in the affirmative. We affirm those findings and conclusions.

BROADNESS OF COMMISSION ORDER

The Pittsburgh Press properly points out that Section 4(c) of the Ordinance states:

"Employer—Any person who employs five or more employees, exclusive of the parents, spouse or children of such person, including the City of Pittsburgh its departments, boards, commissions, and authorities and any other governmental agency within its jurisdiction, but excluding any religious, fraternal, charitable or sectarian organization which is not supported in whole or part by any governmental appropriations."

Section 4(d) of the Ordinance states:

"Employment — The term 'employment' shall not include the employment of individuals in domestic service."

The record clearly shows that approximately 25 per cent of the advertisers placing employment want ads in the Pittsburgh Press are based within the City of Pittsburgh. The record further indicates that the Ordinance cannot affect out-of-city advertisers seeking employees for jobs located outside the jurisdiction of the Commission. Perhaps more importantly the Pittsburgh Press points out that in the introductory clause of Section 8 it is stated:

> "It shall be an unlawful employment practice, except where based upon applicable national security regulations established by the United States, by the Commonwealth of Pennsylvania, or by any political subdivision of the Commonwealth having jurisdiction in the City of Pittsburgh, or *except where based upon a bona fide occupational exception certified by the commission* in accordance with Section 7, Subsection (d) of this ordinance: . . . ." (Emphasis added)

It is clear then that the Ordinance itself sets forth a number of exemptions whereby it would be legally permissible to discriminate. We are not called upon to pass on the morality or social wisdom of such exemptions; and certainly it is not within the scope of review of this Court to review the philosophical beliefs or the wisdom of the legislative body which created this Ordinance. The question presented to us is whether the order of the Commission was too broad.

For the purpose of clarification on this point, we set forth the order of the Commission which reads as follows:

> "AND NOW, to wit, this 23rd day of July, 1970, in accordance with the foregoing discussion findings

of fact, and conclusions of law, it is ordered, adjudged, and decreed that:

"1. The Pittsburgh Press shall, within thirty (30) days from the date of this order, cease and desist from violating Section 8(j) of Ordinance No. 75 of 1967, as amended, and that

"2. The Pittsburgh Press shall, within thirty (30) days from the date of this order, utilize the classification system of employment advertisement with no reference to sex."

The lower court affirmed this order except as to the extension of time. There can be no question that the order of the Commission restricts the Pittsburgh Press from making *any* reference to sex in its classification system of employment advertising. We must agree with the argument that the order of the Commission is too broad.

Section 402 of the Appellate Court Jurisdiction Act, (ACJA), Act of July 30, 1970, P.L.—(Act No. 223, 1970), 17 P.S. 211.402, gives jurisdiction to this Court on appeals from the common pleas court, when the "application, interpretation or enforcement" of a local ordinance, such as here, is in question. This Court is given the power to modify the order of either the lower court or of the Commission in Section 504* of the ACJA, *supra*. We will therefore modify the above-noted order

*"Section 504. Disposition of Appeals. — An appellate court may affirm, modify, vacate, set aside or reverse any order brought before it for review, and may remand the matter and direct the entry of such appropriate order, or require such further proceedings to be had as many be just under the circumstances."

of the Commission and the order of the lower court, and direct the Court of Common Pleas to enter it in conformity with this opinion. In all other respects we affirm the adjudication of the Commission and the order of the court below.

Based upon the above discussion, we

**Order**

AND NOW, this 27th day of January, 1972, in accordance with the adjudication of the Pittsburgh Human Relations Commission, dated July 23, 1970, and the Opinion of the Commonwealth Court of Pennsylvania filed this date, it is hereby ordered that the Pittsburgh Press Company shall within thirty (30) days from the date of this Order, cease and desist from violating Section 8(j) of the City of Pittsburgh Ordinance No. 75 of 1967, as amended, including all reference to sex in employment advertising column headings, except as may be exempt under said Ordinance, or as may be certified as exempt by said Commission. This Order shall be entered forthwith in the records of the Prothonotary of Allegheny County at No. S.A. 768 of 1970.

HARRY A. KRAMER,
Judge

CERTIFIED FROM THE RECORD

FRANCIS C. BARBUSH,
Chief Clerk

January 27, 1972.

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

**Opinion**

DISSENTING OPINION BY JUDGE CRUMLISH, JR.

Filed: January 27, 1972:

I dissent. The Pittsburgh Press Company has been cited by the Pittsburgh Commission on Human Relations for aiding or participating in the unlawful employment practice of publishing advertisements which discriminate the sexes. The Commission stated in its opinion: "As a necessary step in the adjudication of this case, the Commission must determine whether the action of an employer in causing an advertisement to be placed in a sex-segregated column itself violates the ordinance." I believe that the factual findings of the Commission, as recited in either the formal findings of fact or the text of the Commission's opinion, are not sufficient to support the conclusions that advertising in gender-segregated columns establishes of itself discrimination in employment. Absent proof, Pittsburgh Press cannot be justifiably accused of aiding in an unlawful employment practice.

As the majority said, we are reviewing the findings and conclusions of the Commission and not those of the court below. *Romain v. Middletown Area School District*, 1 Pa. Commonwealth Ct. 419, 421, 275 A. 2d 400 (1971). We must therefore look to the Decision and Order of the Commission in determining whether an unlawful employment practice occurred.

Section 10(i) of the Pittsburgh Human Relations Ordinance reads in part: ". . . If upon all the evidence

presented, the Commission finds that the respondent has engaged or is engaging in an unlawful practice, *it shall state its findings of fact in writing* and shall issue such an order in writing *as the facts warrant . . .*" (emphasis added). For Pittsburgh Press to be guilty of aiding and abetting an unlawful practice, section 10(i) would require factual findings by the Commission evidencing unlawful discrimination by employers. The Commission's failure to substantiate its legal conclusions is fatal to its adjudication of the publisher's guilt.

Only the following findings of fact were set forth by the Commission:

"1. The Pittsburgh Press is a newspaper of general circulation, and is engaged in business as a newspaper within the City of Pittsburgh.

"2. The National Organization for Women is an organization which has as one of its purposes combatting discrimination on the basis of sex. The Pittsburgh Chapter of the National Organization for Women has an office within the City of Pittsburgh.

"3. In 1969, the Pittsburgh Press ran a total of 248,000 help-wanted advertisements in its daily and Sunday editions.

"4. Of this advertising 25 per cent is placed by advertisers based in the City of Pittsburgh.

"5. The Pittsburgh Press permits the advertiser to select the column within which its advertisement is to be inserted.

"6. When an advertiser does not indicate a column, the Press asks the advertiser whether it wants a male or female for the job and then inserts the advertisement

in the jobs — male interest or jobs — Female interest column accordingly.

"7. Prior to October of 1969, the Pittsburgh Press carried headings or captions on its relevant employment column as follows: "Male Help Wanted," "Female Help Wanted," and "Male-Female Help Wanted."

"8. From October of 1969 to the present time, the captions read: "Jobs — Male Interest," "Jobs — Female Interest," and "Male-Female."

"9. The Pittsburgh Press is an agent for the Pittsburgh Post-Gazette is the processing of employment advertisements.

"10. The Pittsburgh Press is the twelfth largest classified advertisement newspaper in the United States. The approximate circulation of the Pittsburgh Press daily is 350,000 and on Sunday 750,000."

These form the basis which purports to support the Commission's legal conclusion that "[i]t is an unlawful employment practice for an employer . . . to cause to be published an employment advertisement in a newspaper column, which column contains a caption with a designation as to sex." Clearly, the factual findings of the Commission, standing alone, do not support the conclusion reached. There is no factual showing that gender-segregated advertisements, with prominent disclaimers of discrimination, do in fact cause discrimination in employment.

The decision of the Commission allows three bases for its conclusion that gender-segregated columns are unlawful advertising by employers. First, it relies on the testimony of the Press' Classified Ad Manager who said that, in determining in which column to insert the

advertisement of a prospective employer who did not proffer a column preference, he advises the employer which of the sexes usually fills that particular position or he tries "to find out what type of person [the employer is] looking for." Although this testimony is damaging to the publisher's case, I see nothing more to this than that in an undetermined number of cases, all of which could have been exempt from or beyond the limits of the Commission's jurisdiction, employers do advertise in a particular column for the purpose of obtaining the service of a male or female. It was incumbent upon the Commission, however, to determine by evidence and factual findings, that the publisher's system was so egregious as to require the complete elimination of the practice rather than increased policing or regulation of it.

The second reason advanced by the Commission in its conclusion was "the necessary implication of the segregated columns . . . that men are given preference for jobs in one set of columns, and women are given preference for jobs in the other set . . . supported by the fact that the Pittsburgh Press runs a third section of employment advertisements, 'male-female' . . . available to men or women without discrimination." Are we to uphold the Commission's conclusion of "necessary implication" of discrimination when this conclusion is neither explained or substantiated by factual finding? Can we not say that another "necessary implication" is that an employer is seeking to reach the greatest number of qualified applicants by his action? Placing an advertisement in a gender-segregated column with this motive would not be illegal practice. Would the Commission proscribe advertising in the Jewish Ex-

ponent or Ebony Magazine because of the "necessary implication" that such advertisements do not reach non-Jewish and non-Black potential applicants? State and municipal administrative tribunals must act upon the findings of fact as adopted by them. They may not rely upon "necessary implications" without adopting a sufficient basis in fact to support it.[1]

Finally, the Commission, takes notice of certain jurisdictions which have found gender-segregated column unlawful per se. In each jurisdiction, the determination of unlawfulness was made by administrative regulation. The conclusion of per se discrimination has not heretofore been judicially tested in any of these jurisdictions. Nor has the Commission set forth or adopted the factual basis upon which these jurisdictions have reached this conclusion.

It is most unfortunate and disturbing to me to observe that in this landmark litigation, the adjudicating body has chosen to disregard the evidence presented it: that instead of seeking proof of its position, it has chosen to rely on unsubstantiated hunches and feelings. The issue raised herein deserves and requires greater in-depth consideration of the evil of gender-segregated

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1. We note, as the brief for the National Organization for Women suggests, that the testimony of Dr. Sandra Bem of Carnegie-Mellon University contains ample basis for finding that the full force and effect of an ad placed in the male column is to discourage women from applying. However, the Commission made no finding on the issue and did not use this testimony as support in its adjudication. We cannot guess as to the credence and credibility which the Commission ascribed to Dr. Bem's testimony. Under the mandate of section 10(i) of the City's ordinance we can only assume that the Commission disregarded this evidence.

want ads. The Commission's opinion and finding of fact do not substantiate their position that gender-segregated advertising is an unlawful employment practice.

Finally, it is necessary to comment upon the relationship of gender to other traits such as race, religion or ancestry. The court below stated in its opinion that "[s]ex classification is as unlawful as general captions of 'Black', 'White', 'Catholic', 'Presbyterian', 'Italian', 'Polish', or 'German' would be unlawful. [That] court will not reverse the determination that sex is an unlawful general designation just as any other comparable designation which uses sex, race, religion or national origin would be contrary to law.' The majority adopts this position. I cannot, however, agree that classification by gender is by itself discriminatory.

To classify job interest by race or natural origin, while it may have some basis in fact, would be unlawful The illegality of such advertising lies in the fact that the preferences expressed by such groups are the result of socio-economic factors, not inate characteristics of race or national origin. It is unlawful discrimination, without proper basis, to classify race or national origin socio-economically.

Unlike race and national origin, gender classification is based upon biological and emotional differences. The Bona Fide Occupational Qualification exemption for job related discrimination based upon gender clearly demonstrates that gender classification may have non-discriminatory bases in fact. The question of *inate* differences in job *preference,* as well as in occupational ability, is not per se unfounded. We must keep in mind that only unnatural or unjustifiable dis-

crimination is wrongful. In my judgment, discrimination by natural classification does not violate anyone's Constitutional rights.

Because of the nature of sexual differences, as opposed to racial or ethnic differences, it was necessary for the Commission to dispell the notion that the Pittsburgh Press method of gender-segregated advertising results in gender-segregated employment practices which, even if distinguished by gender are based upon bona fide natural differences between the sexes. This classification would not be "discrimination" within the meaning of the Pittsburgh ordinance.

Despite the assertion by the lower court to the contrary, the task before the Commission was not formidable. Indeed the record before it may even contain "substantial evidence" upon which to ground its result. But the Commission must clearly adopt those findings of fact upon which it bases its conclusions of law. It must not be moved by current popular sentiment to implement its own whims, feelings, and philosophy. It must never be so zealous in the protection of the right to be free from discrimination as to act without legal basis; for when government becomes too protective, the basic freedoms we all enjoy erode, move into the legal dark ages, and we are back again to mere hope for basic freedoms.

JAMES C. CRUMLISH, JR., Judge

Judge Mencer joins in this Dissenting Opinion.

Certified from the Record.

FRANCIS C. BARBUSH.
Chief Clerk.
January 27, 1972.

*Dissenting Opinion by Judge Mencer.*

IN THE
COMMONWEALTH OF PENNSYLVANIA

DISSENTING OPINION BY JUDGE MENCER

Filed January 27, 1972

I respectfully dissent. The complaint in this case alleged a violation by The Pittsburgh Press Company (appellant) of Section 8(j) of the City of Pittsburgh's Human Relations Ordinance. Section 8(j) makes it an unlawful employment practice "to aid, incite, compel, coerce or participate in the doing of any act declared to be an unlawful employment practice or to obstruct or prevent any person from enforcing or complying with the provisions of this ordinance, or any rule, regulation or Order of the Commission, or to attempt directly or indirectly to commit any act declared by this ordinance to be unlawful employment practice".

The complaint does not allege any violation by anyone else. It is simply impossible for the appellant to be guilty of aiding another in the violation of the ordinance when no violation is even alleged and in fact no attempt was made to prove such a violation. It is fundamental that one cannot aid that which did not occur.

I must conclude that due process clearly requires that, without alleging or proving a violation of the ordinance by an employer who was aided by appellant, the complaint is invalid on its face and should be dismissed.

GLENN E. MENCER, J.

Certified From the Record
FRANCIS C. BARBUSH
Chief Clerk
January 27, 1972

**Per Curiam Order of the Supreme Court of Pennsylvania**

*(Reprinted in the Appendix to the Petition for Certiorari at pages 80a and 81a)*

*Ordinance No. 75.*

## HUMAN RELATIONS ORDINANCES OF THE CITY OF PITTSBURGH

### ORDINANCE NO. 75

ENACTED INTO LAW BY THE COUNCIL OF THE CITY OF PITTSBURGH ON FEBRUARY 27, 1967. APPROVED BY THE MAYOR, FEBRUARY 28, 1967. RECORDED IN VOLUME 68, PAGE 511, IN THE OFFICE OF THE CITY CLERK.

### AN ORDINANCE

Prohibiting discrimination in employment, housing, public accommodations and other areas of intergroup relations in the social cultural and economic life of the City of Pittsburgh; requiring fair employment practices, fair housing practices and fair public accommodations practices by prohibiting discrimination in employment, housing and public accommodations because of race, color, religion, ancestry, national origin or place of birth; establishing a Commission on Human Relations in the Office of the Mayor and prescribing the powers and duties thereof; providing penalties, and revising and consolidating the ordinances relating thereto.

The Council of the City of Pittsburgh hereby enacts as follows:

SECTION 1. SHORT TITLE

This Ordinance may be cited as the Pittsburgh Human Relations Ordinance.

SECTION 2. LEGISLATIVE FINDINGS AND DECLARATION OF POLICY

(A) Legislative Findings

(1) The population of the City of Pittsburgh con-

sists of people of every race, color, religion, ancestry, national origin and place of birth, many of whom by reason of their race, color, religion, ancestry, national origin or place of birth are discriminated against in employment opportunities, places of public accommodation, resort, recreation and amusement, and housing facilities.

(2. Discrimination because of race, color, religion, ancestry, national origin or place of birth is contrary to the constitutions, laws and policies of the Commonwealth of Pennsylvania and the United States of America.

(3) Discrimination in employment prevents the gainful employment of large segments of citizens of the City, tends to impair the City's productive capacity, reduce the public revenues, impose substantial financial burdens upon the public for relief and welfare, and tends to create breaches of the peace and depressed living conditions which breed crime, vice, juvenile delinquency and disease, and is detrimental to the public safety, economic growth and general welfare of the City of Pittsburgh.

(4) Discrimination in housing results in overcrowded, segregated areas with substandard, unsafe and unsanitary living conditions, which cause increased mortality, disease, crime, vice and juvenile delinquency, fires and risk of fire, intergroup tensions and other evils, all of which increase the cost of government and reduce the public revenues, and result in injury to the public safety, health and welfare of the City of Pittsburgh.

(5) Discrimination in places of public accommodations, resort, recreation, amusement and places of

business causes humiliation, embarassment and inconvenience to citizens and visitors of the City, tends to create breaches of the peace, intergroup tensions and conflicts and similar evils, and is detrimental to the public safety, general welfare and economic growth of the City of Pittsburgh.

(B) Declaration of Policy

It is hereby declared to be the policy of the City of Pittsburgh, in the exercise of its powers for the protection of the public safety and the general welfare, for the maintenance of peace and good government and for the promotion of the City's trade, commerce and manufactures, to assure the right and opportunity of all persons to participate in the social, cultural, recreational and economic life of the City and to assure equal opportunity for all persons to live in decent housing facilities, free from restrictions because of race, color, religion, ancestry, national origin or place of birth.

To accomplish these goals it shall be the public policy of the City of Pittsburgh to prohibit discrimination because of race, color, religion, ancestry, national origin or place of birth in employment, housing and places of public accommodation, resort, recreation or amusement.

SECTION 3. SCOPE OF THE ORDINANCE

This Ordinance applies to discriminatory practices, including but not limited to discrimination in employment, housing and public accommodations, which occur within the territorial limits of the City of Pittsburgh and to employment, contracted for, performed or to be performed within these limits, and to housing accommodation, resort, recreation and amusement located within the territorial limits of the City.

SECTION 4. DEFINITIONS

As used in this Ordinance, the following terms shall have the meanings indicated, unless a different meaning clearly appears from context:

(a) Commission—The Commission on Human Relations established in the office of the Mayor of the City of Pittsburgh by this Ordinance.

(b) Discriminate and discrimination — The terms "discriminate" and "discrimination" include any difference in treatment based on race, color, religion, ancestry, national origin or place of birth.

(c) Employer — Any person who employs five or more employees, exclusive of the parents, spouse or children of such person, including the City of Pittsburgh, its departments, boards, commissions, and authorities, and any other governmental agency within its jurisdiction, but excluding any religious, fraternal, charitable or sectarian organization which is not suported in whole or part by any governmental appropriations.

(d) Employment — The term "employment" shall not include the employment of individuals in domestic service.

(e) Employment Agency — Any person regularly undertaking with or without compensation to procure opportunities for employment or to procure, recruit, refer or places employees.

(f) Housing Accommodation — (1) a building, structure or portion thereof which is used or occupied, or is intended, arranged or designed to be used or occupied, as a home, residence or sleeping

place by a person, by a family or by a group of persons living together, or (2) a parcel of real property or lot available for the construction of a housing accommodation.

(g) Labor Organization — Any organization which exists for the purpose in whole or in part of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid protection in relation to employment.

(h) Lending Institution — Any bank, insurance company, saving and loan association, or any other person regularly engaged in the business of lending money or guaranteeing loans.

(i) Owner — The term "owner" includes the owner, co-owner, lessee, sub-lessee, mortgagee, assignee, manager, agent, or any other person having the right of ownership or possession or the authority to sell, rent or lease any housing accommodation, or any person having an equitable or security interest in any housing accommodation, including the City of Pittsburgh and its departments, boards, commissions, and authorities.

(j) Person — Any individual, partnership, corporation, labor organization or other organization or association, including those acting in a fiduciary or representative capacity, whether appointed by a court or otherwise. The term person, as applied to partnerships or other organizations or associations, includes their members, and as applied to corporations includes their officers.

(k) Real Estate Broker — Any natural person, partnership, corporation or other association which for a fee or other valuable consideration manages, sells, purchases, exchanges or rents or negotiates, or offers or attempts to negotiate the sale, purchase, exchange or rental of, the real property of another, or holds itself out as engaged in the business of managing, selling, purchasing, exchanging or renting the real property of another, or collect rent for the use of the real property of another, and includes real estate salesman or agents or any other person employed by a real estate broker to perform or to assist in the performance of his business.

(l) Public Accommodation, Resort, Recreation or Amusement — The term "Public Accommodation, Resort, Recreation or Amusement" includes any place, business or activity which is open to, accepts or solicits the patronage of the general public or offers goods, services or recreation to the general public.

ECTION 5. COMMISSION ON HUMAN RELATIONS:

(a) There is hereby established in the Office of the ayor, a commission on Human Relations to administer, plement and enforce the provisions of this ordinance.

(b) The Commission shall consist of fifteen (15) embers to be appointed by the Mayor for a four-year rm. Commisioners may be reappointed to successive rms of office. Each member of the Commission shall ntinue to serve after his term until his successor has en appointed and qualified.

(c) The term of all present members of the Commission shall not be affected by the enactment of this ordinance.

(d) The Commision shall elect one of its members as chairman and may elect such other officers as it may deem necessary. The Chairman may, with the approval of the Commission, appoint such committees as may be necessary to carry out the powers and duties of the Commision and the Commission may authorize such committees to take any necessary action for the Commission.

(e) The Commission shall adopt such rules and regulations for its own organization, operations and procedures as the Commission shall deem necessary to administer, implement and enforce this ordinance.

(f) The Commission shall hold at least ten monthly meetings during each calender year. Five (5) members of the Commission shall constitute a quorum for the transaction of business, and a majority vote of those present at any meeting shall be sufficient for any official action taken by the Commission, except that approval of a majority of the members of the Commission hall be required before any public hearing may be held.

(g) The members of the Commission shall serve without compensation, but they may be reimbursed for all expenses necessary incurred in the performance of their duties in accordance with appropriations made by City Council.

SECTION 6. EXECUTIVE DIRECTOR

(a) The Mayor shall appoint an Executive Director and such other personnel as may be authorized by City

Council to assist the Commission in administering, implementing and enforcing the provisions of this ordinance. In proposing a budget for the operation of the Commission and in selecting the Executive Director and other personnel, authorized by City Council, the Mayor shall take into consideration the recommendations of the Commission.

(b) The Executive Director hall serve as the staff executive officer for the Commission. He shall promote the efficient transaction of its business, the orderly handling of complaints and other matters before the Commission, and shall supervise the Commission, and shall supervise the Commission staff.

(c) The Commission may authorize the Executive Director to initiate complaints of unlawful practices, as set forth in this ordinance.

SECTION 7. POWERS AND DUTIES OF THE COMMISSION ON HUMAN RELATIONS

The Commission shall have the power and it shall be its duty to:

(a) Initiate, receive, investigate and seek the satisfactory adjustment of complaints charging unlawful practices, as set forth in this ordinance.

(b) Initiate or receive and investigate other complaints of discrimination against any person because of race, color, religion, ancestry, national origin or place of birth, and to seek the satisfactory adjustment of such complaints. Any complaint filed under this subsection which the Commission believes may constitute a violation of a law of the United States of America or the

Commonwealth of Pennsylvania may be certified to the City Solicitor for such actions as he may deem proper.

(c) Hold public hearings, subpoena witnesses and compel their attendance, administer oaths, take the testimony of any person under oath, and in connection therewith require the production of evidence relating to any matter under investigation or any question before the Commission, make finds of fact, issue orders and publish such findings of fact and orders and do all other things necessary and proper for the enforcement of this ordinance.

(d) Certify upon the request of any person that a particular occupation or position is exempt from the provisions of this ordinance relating to unlawful employment practices if the Commission find that the occupation of a person or persons of a particular race, color, religion, ancestry, national origin or place of birth, and that such certification is not sought as means of circumventing the spirit and purpose of this ordinance, the burden of proving the facts required for such a finding to be in each instance upon the person requesting the certification of exemption from the provisions of this ordinance.

(e) Study and investigate by means of pub-hearings or otherwise any conditions having an adverse effect on intergroup relations in the City of Pittsburgh and to study the problems of prejudice, intolerance, bigotry and discrimination as they effect the public safety and general welfare of the City of Pittsburgh.

(f) Institute and conduct educational and other programs to promote the equal rights and opportunities of all persons, regardless of their race, color, religion,

ancestry, national origin or place of birth, and to promote understanding among persons and groups of different races, colors, religion, ancestries, national origins or places of birth. In the performance of its duties, the Commission may cooperate with interested citizens, private agencies and agencies of the federal, state and local governments.

(g) Issue publications and reports of investigation and research in the field of human relations, and to cooperate with and accept grants from public and private agencies, including foundations, colleges and universities, engaged in similar research.

(h) Request other departments, boards and commissions of the City government to assist in the performance of its duties, and such other departments, boards and commissions shall cooperate fully with the Commission.

(i) Assist in the enforcement of fair practices in City contracts.

(j) Render from time to time a written report of its activities and recommendations to the Mayor and to City Council.

(k) Recommend legislation to promote and insure equal rights and opportunities for all persons regardless of their race, color, religion, ancestry, national origin or place of birth.

(l) Adopt such rules and regulations as may be necessary to carry out the purposes and provisions of this ordinance.

SECTION 8. UNLAWFUL EMPLOYMENT PRACTICES

It shall be an unlawful employment practice, except where based upon applicable national security regulations established by the United States, by the Commonwealth of Pennsylvania, or by any political subdivision of the Commonwealth having jurisdiction in the City of Pittsburgh, or except where based upon a bona fide occupational exemption certified by the Commission in accordance with Section 7, subsection (d) of this ordinance:

(a) For any employer to refuse to hire any person or otherwise discriminate against any person with respect to hiring, tenure, compensation, promotion, discharge or any other terms, conditions or privileges directly or indirectly related to employment because of race, color, religion, ancestry, national origin or place of birth.

(b) For any employer, employment agency or labor organization to establish, announce or follow a policy of denying or limiting, through a quota system or otherwise, the employment or membership opportunities of any person or group of persons because of race, color, religion, ancestry, national origin or place of birth.

(c) For any employer, labor organization, employment agency or any joint labor-management committee controlling apprentice training programs to deny to or withhold from any person the right to be admitted to or participate in a guidance program, an apprenticeship training program, an on-the-job training program or any other occupational training program because of race, color, religion, ancestry, national origin or place of birth.

(d) For any employer, employment agency or labor organization to require of any applicant for employment or membership any information concerning race, color, religion, ancestry, national origin or place of birth.

(e) For any "employer," employment agency or labor organization to publish or circulate, or to cause to be published or circulated, any notice or advertisement relating to "employment" or membership which indicates any discrimination because of race, color, religion, ancestry, national origin or place of birth.

(f) For any employment agency to fail or refuse to classify properly or refer to employment or otherwise to discriminate against any person because of race, color, religion, ancestry, national origin or place of birth.

(g) For any employer substantially to confine or limit recruitment or hiring of employees, with intent to circumvent the spirit and purpose of this ordinance, to any employment agency, employment service, labor organization, training school, training center or any other employee-referring source which serves persons who are predominantly of the same race, color, religion, ancestry, national origin or place of birth.

(h) For any labor organization to discriminate against any person in any way which would deprive or limit his employment opportunities or otherwise adversely affect his status as an applicant for employment or as an employee with regard to tenure, compensation, promotion, discharge or any other terms, conditions or privileges directly or indirectly related to employment

because of race, color, religion, ancestry, national origin or place of birth.

(i) For any employer, employment agency or labor organization to discriminate against any person because he has opposed any practice forbidden by this ordinance or because he had made a complaint or testified or assisted in any manner in any investigation or proceeding under this ordinance.

(j) For any person, whether or not an employer, employment agency or labor organization, to aid, incite, compel, coerce or participate in the doing of any act declared to be an unlawful employment practice by this ordinance, or to obstruct or prevent any person from enforcing or complying with the provisions of this ordinance or any rule, regulation or order of the Commission, or to attempt directly or indirectly to commit any act declared by this ordinance to be unlawful employment practice.

SECTION 9. UNLAWFUL HOUSING PRACTICES

It shall be an unlawful housing practice, except as otherwise provided in this section:

(a) For any owner, real estate broker or any other person to refuse to sell, lease, sublease, rent, assign or otherwise transfer, or to refuse to negotiate for the sale, lease, sublease, rental, assignment or other transfer of the title, leasehold or other interest in any housing accommodation to any person, or to represent that any housing accommodation is not available for inspection, sale, lease, sublease, rental, assignment or other transfer when in fact it is so available, or otherwise to deny or withhold any housing accommodation from any person

because of race, color, religion, ancestry, national origin, or place of birth, or to discriminate against, segregate or assign quotas to any person or group of persons in connection with the sale, lease, sublease, rental, assignment or other transfer of the title, leasehold, or other interest in any housing accommodation or housing accommodations.

(b) For any person, including any owner or real estate broker, to include in the terms, conditions or privileges of any sale, lease, sublease, rental, assignment or other transfer of any housing accommodation any clause, condition or restriction discriminating against, or requiring any other person to discriminate against, any person in the use or occupancy of such housing accommodation because of race, color, religion, ancestry, national origin or place of birth.

(c) For any person, including any owner or real estate broker, to discriminate in the furnishing of any facilities or services for any housing accommodation because of race, color, religion, ancestry, national origin or place of birth.

(d) For any person, including any owner or real estate broker, to publish, circulate, issue or display, or cause to be published, circulated, issued or displayed, and communication, notice, advertisement or sign of any kind relating to the sale, rental, lease, sublease, assignment, transfer or listing of a housing accommodation or accommodations which indicates any preference, limitation, specification or discrimination based on race, color, religion, ancestry, national origin, or place of birth.

(e) For any person, including any bank, banking organization, mortgage company, insurance company or other financial or lending institution, or any agent or employee thereof, to whom application is made for financial assistance for the purchase, lease, acquisition, construction, rehabilitation, repair or maintenance of any housing accommodation or housing accommodations:

(1) to discriminate against any person or group of persons because of race, color, religion, ancestry, national origin or place of birth of such person or group of persons or of the prospective occupants or tenants of such housing accommodation in the granting, withholding, extending, modifying, or renewing, or in the rates, terms, conditions or privileges of any such financial assistance or in the extension of service in connection therewith; or

(2) to use any form of application for such financial assistance or make any record or inquiry in connection with applications for such financial assistance which indicates, directly or indirectly, any limitation, specification or discrimination as to race, color, religion, ancestry, national origin or place of birth, or any intent to make any such limitation, specification or discrimination.

(f) For any real estate broker or real estate salesman or agent, or any other person for business or economic purposes, to induce, directly or indirectly, or to attempt to induce directly or indirectly, the sale or rental or the listing for sale or rental, of a housing accommodation by representing that a change has occurred or will or may occur with respect to the racial, religious

or ethnic composition of the street, block, neighborhood or area in which said housing accommodation is located.

(g) For any person, whether or not a real estate broker, real estate salesman or agent, owner or lending institution to aid, incite, compel, coerce or participate in the doing of any act declared to be an unlawful housing practice under this ordinance, or to obstruct or prevent enforcement or compliance with the provisions of this ordinance or any rule, regulation or order of the Commission, or to attempt directly or indirectly to commit any act declared by this ordinance to be unlawful housing practice.

(h) Nothing in this ordinance shall bar any religious or sectarian institution or organization, or any charitable or educational organization which is operated, supervised or controlled by or in connection with a religious or sectarian organization, or any bona fide private or fraternal organization from limiting admission to or giving preference to persons of the same religion or sect, or to members of such private or fraternal organization, or from making such selection as is calculated by such organization to promote the religious or sectarian principles or the aims, purposes or fraternal principles for which it is established or maintained.

SECTION 10. UNLAWFUL PUBLIC ACCOMMODATION PRACTICES

It shall be an unlawful public accommodation practice:

(a) For the owner, lessee, proprietor, manager, superintendent, agent or employee of any business or place of public accommodation, resort, recreation or amusement to:

(1) refuse, withhold from or deny to any person because of his race, color, religion, ancestry, national origin or place of birth, either directly or indirectly, any of the accommodations, advantages, facilities, services or privilges, products of goods of such place of public accommodation, resort or amusement; or

(2) publish, circulate, issue, display, post or mail, either directly or indirectly, any written or printed communication, notice or advertisement to the effect that any of the accommodations, advantages, facilities, goods, products, services and privileges of any such place shall be refused, withheld or denied to any person on account of race, color, religion, ancestry, national origin or place of birth, or that the patronage of any person of any particular race, color, religion, ancestry, national origin or place of birth is unwelcome, objectionable, or not acceptable, desired or solicited.

(b) For any person, whether or not included in Section 10(a) of this ordinance, to aid, incite, compel, coerce or participate in the doing of any act declared to be an unlawful public accommodations practice under this ordinance.

SECTION 11. OBSTRUCTION OF FAIR PRACTICES

It shall be unlawful for any person, whether or not within the named classifications set forth in this ordinance, to aid, incite, compel, coerce or participate in the doing of any act declared to be an unlawful practice under this ordinance, or to obstruct or prevent enforcement or compliance with the provisions of this ordinance or any rule, regulation or order of the Commission or to attempt directly or nidirectly to commit

any act declared by this ordinance to be an unlawful practice.

SECTION 12. CITY CONTRACTS

(a) All contracts of the City of Pittsburgh and its contracting agencies shall obligate the contractor to comply with this ordinance and with any state or federal law or laws or regulations relating to unlawful employment practices in connection with any work to be performed thereunder and shall require the contractor to include a similar provision in all subcontracts.

(b) The Commission shall promulgate rules and regulations for the processing of complaints of discrimination received under this section.

SECTION 13. PROCEDURE

(a) A complaint charging that any person has engaged or is engaging in any unlawful practice as set forth in this ordinance, my be made by the Commission, by an aggrieved person or by an organization which has as one of its purposes the combating of discrimination or the promotion of equal opportunities, and any complaint may be amended by the complainant or the Commission at any time before final action has been taken by the Commission, in accordance with such rules and regulations as the Commission shall prescribe.

(b) The complaint shall be in writing, signed and verified, and include the name and address of the person or persons alleged to have committed the unlawful practice and the particulars thereof and such other information as may be required by the Commission.

(c) The Executive Director and staff shall make a prompt and full investigation of each complaint of an unlawful practice and report to the commission.

(d) If the Commission shall determine that there is no basis for the allegations in a complaint, the complaint shall be dismissed and the complainant notified in writing. Within ten (10) days from the receipt of such notice, the complainant or his attorney, may file with the Commission a request for review and the Commission shall provide the complainant and his attorney an opportunity to appear before the Commission, a member thereof, or a staff representative of the Commission. After such a review the Commission may reverse its decision, or if the Commission or its representative determines that there is no basis for the allegation, the dismissal of the complaint shall be affirmed and there shall be no further review of such decision.

(e) If the Commission determines after investigation that probable cause exists for the allegations made in the complaint, it may attempt to eliminate the unlawful practice by means of private conferences or meetings with all parties. The Commission shall not make public the details of such informal proceedings, but it may publish the terms of any agreement when a complaint has been satisfactorily adjusted.

(f) If the Commission determines that a housing accommodation or housing accommodations involved in a complaint of an unlawful housing practice under Section 9 of this ordinance may be sold, rented or otherwise disposed of, before a determination of the case has been made, and the Commission believes that there is prob-

able cause for the complaint, the Commission may request the City Solicitor to seek an injunction restraining the sale, rental, or other disposition of the housing accommodation or housing accommodations in accordance with the provisions of Section 9.1 of the Pennsylvania Human Relations Act of October 27, 1955, P. L. 744, added by Act No. 533, approved January 24, 1966, as hereafter amended, supplemented or modified by the General Assembly of Pennsylvania.

(g) In any case of failure to eliminate the unlawful practice charged in the complaint by means of informal proceedings, or in advance thereof, if in the judgment of the Commission the facts so warrant, the Commission may hold a public hearing to determine whether or not an unlawful practice has been committed or, without holding such a hearing, certify the case to the City Solicitor in accordance with Section 14 of this ordinance.

(h) Where a public hearing is ordered, the Commission shall designate one or more members to conduct such a hearing. The Commission shall serve upon the person charged with having engaged or engaging in the unlawful practice, hereinafter referred to as respondent, a statement of the charges made in the complaint or amended complaint and a notice of the time and place of the hearing. The hearing shall be held not less than ten (10) days after the service of the statement of charges.

The respondent shall have the right to file an answer to the statement of charges, to appear at the hearing in person or to be represented by an attorney, or, subject to the approval of the hearing panel, by any other person, an to examine and cross-examine wit-

nesses. The complainant shall also have the right to be represented by an attorney, or subject to the approval of the hearing panel, by any other person. The Commission shall not be bound by the strict rules of evidence prevailing in courts of law or equity. The testimony, taken at the hearing, shall be under oath and maye be transcribed.

(i) If upon all the evidence presented, the Commission finds that the respondent has not engaged in any unlawful practice, it shall state its findings of fact in writing and dismiss the complaint. If upon all the evidence presented, the Commission finds that the respondent has engaged or is engaging in an unlawful practice, it shall state its findings of fact in writing and shall issue such order in writing as the facts warrant to effectuate the purposes of this ordinance. Such order may require the respondent to cease and desist from such unlawful practice and to take such affirmative action, including, but not limited to, the hiring, reinstatement or upgrading of employees, with or without back pay, admission or restoration to membership in any respondent labor organization, the selling, renting or leasing of a housing accommodation or housing accommodations upon equal terms and conditions and with such equal facilities, ervices and privileges, the tendering of money, whether or not secured by mortgage or otherwise for the acquisition, construction, rehabilitation, repair or maintenance of any housing accommodation, the granting, permitting, selling or admission to any of the accommodations, advantages, facilities, services or privileges, products or goods of any respondent place of public accommodation, resort, recreation or amusement, upon such equal terms and conditions to any person dis-

criminated against or to all persons as, in the judgment of the Commission, will effectuate the purpose of this ordinance and are warranted by the facts presented at the hearing, including a requirement for a report or reports of the manner of compliance. Copies of the order shall be served on all parties.

SECTION 14. ENFORCEMENT

In the event the respondent refuses or fails to comply with any order of the Commission or violates any of the provisions of this ordinance, the Commission shall certify the case and the entire record of its proceedings to the City Solicitor, who shall invoke the aid of an appropriate court to secure enforcement or compliance with the order or to impose the penalties set forth in Section 15, or both.

SECTION 15. PENALTIES

Any person who shall violate any provision of this ordinance relating to unlawful practices, or any rule or regulation pertaining thereto adopted by the Commission or any order of the Commission, shall be subject to a fine of note more than Three Hundred Dollars ($300.00) and in default of payment of the fine and costs shall be subject to imprisonment for a period not exceeding ninety (90) days.

SECTION 16. SEVERABILITY

The provisions of this ordinance are severable and if any provision, sentence, clause, section or part thereof is held illegal, invalid or unconstitutional or inapplicable to any person or circumstances, such illegality, invalidity, unconstitutionality or inapplicability shall not affect or impair any of the remaining provisions, sen-

tences, clauses, sections or parts of the ordinance or their application to other persons or circumstances. It is hereby declared to be the legislative intent that this ordinance would have been adopted if such illegal, invalid or unconstitutional provision, sentence, clause, section or part had not been included therein, and if the person or circumstances to which the ordinance or any part thereof is inapplicable had been specifically exempted therefrom.

SECTION 17. SAVING CLAUSE

The provisions of this ordinance, so far as they are the same as those of ordinances repealed by this ordinance, are intended as a continuation of such ordinances and not as new enactments. The provisions of this ordinance shall not affect any act done or any complaint or dinances. All rules and regulations adopted pursuant to any ordinance repealed by this ordinance shall continue with the same force and effect as if such ordinance had not been repealed.

SECTION 18. EFFECTIVE DATE

The effective date of this ordinance is immediately.

SECTION 19. REPEAL

Ordinance No. 237, approved June 25, 1955, Ordinance No. 523, approved December 8, 1958, and Ordinance No. 106, approved March 10, 1966, are hereby repealed absolutely. Any other ordinance or part of ordinance, conflicting with the provisions of this ordinance, be and the same is hereby repealed, so far as the same affects this ordinance.

**Ordinance Number 395**

Enacted into law by the Council of the City of Pittsburgh on July 3, 1969. Approved by the Mayor, July 7, 1969. Recorded in Volume 70, Page 691, in the office of the City Clerk.

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AN ORDINANCCE — Amending and supplementing Ordinance No. 75, approved February 18, 1967, entitled "An Ordinance prohibiting discrimination in employment, housing, public accomodations and other areas of inter-group relations in the social, cultural and economic life of the City of Pittsburgh; requiring fair employment practices, fair housing practices and fair public accomodation practices by prohibiting discrimination in employment, housing and public accommodations because of race, color, religion, ancestry, national origin or place of birth; establishing a Commission on Human Relations in the Office of the Mayor and prescribing the powers and duties thereof; providing penalties, and revising and consolidating the ordinance relating thereto," to prohibit discrimination in employment, housing and public accommodations and other areas of inter-group relations in the social, cultural and economic life of the City of Pittsburgh because of sex and to require fair employment practices, fair housing practices and fair accommodation practices by prohibiting discrimination in employment, housing and public accommodations for persons of both sexes.

SECTION 1. That Sections 2(A) (1) (2) and Section 2((B) of Ordinance No. 75, approved February 28, 1967, entitled "An Ordinance prohibiting discrimination in employment, housing, public accommodations and

other areas of intergroup relations in the social, cultural and economic life of the City of Pittsburgh; requiring fair employment practices, fair housing practices and fair public accommodation practices by prohibiting discrimination in employment, housing and public accommodations because of race, color, religion, ancestry, national origin or place of birth; establishing a Commission on Human Relations in the Office of the Mayor and prescribing the powers and duties thereof; providing penalties, and revising and consolidating the ordinance relating thereto," is hereby amended to read as follows:

Section 2. Legislative findings and declaration of policy:

(A) Legislative findings.

(1) The population of the City of Pittsburgh consists of people of every race, color, religion, ancestry, national origin, place of birth and sex, many of whom, by reason of their race, color, religion, ancestry, national origin, place of birth or sex are discriminated against in employment opportunities, places of public accommodation, resort, recreation and amusement, and housing facilities.

(2) Discrimination because of race, color, religion, ancestry, national origin, place of birth or sex, is contrary to the Constitution, laws and policies of the Commonwealth of Pennsylvania and the United States of America.

(B) Declaration of policy.

It is hereby declared to be the policy of the City of Pittsburgh, in the exercise of its powers

for the protection of the public safety and the general welfare, for the maintenance of peace and good government and for the promotion of the City's trade, commerce and manufactures, to assure the right and opportunity of all persons to participate in the social, cultural, recreational and economic life of the City and to assure equal opportunity for all persons to live in decent housing facilities, free from restrictions because of race, color, religion, ancestry, national origin, place of birth or sex.

To accomplish these goals, it should be the public policy of the City of Pittsburgh to prohibit discrimination because of race, color, religion, ancestry, national origin, place of birth or sex, in employment, housing and places of public accommodation, resort, recreation or amusement.

SECTION 2. That Section 4(B) of Ordinance No. 75, approved February 28, 1967, entitled as aforesaid, be amended to read as follows:

(B) Discriminate or discrimination — the terms "discriminate" and "discrimination" include any difference in treatment based on race, color, religion, ancestry, national origin, place of birth, or sex.

SECTION 3. That Ordinance No. 75, approved February 28, 1967, entitled as aforesaid, be supplemented by adding thereto a new Section 20 to read as follows:

**Section 20. Unlawful Employment, Housing and Public Accommodations Practices Because of Sex.**

**It shall be an unlawful employment practice, unlawful housing practice or unlawful public accommodation practice for any person to discriminate against any other person in the manner set forth in Sections 8, 9, 10 and 11 of this Ordinance because of sex.**

**SECTION 4. That any Ordinance or part of Ordinance, conflicting with the provisions of this Ordinance, be and the same is hereby repealed so far as the same affects this Ordinance.**

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FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

MICHAEL RODAK, JR., CLE

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-4194

PITTSBURGH PRESS COMPANY,
Petitioner.

v.

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS AND THE CITY OF PITTSBURGH,

and

THE NATIONAL ORGANIZATION FOR WOMEN, INC.

## PETITION OF THE PITTSBURGH PRESS COMPANY FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND APPENDIX

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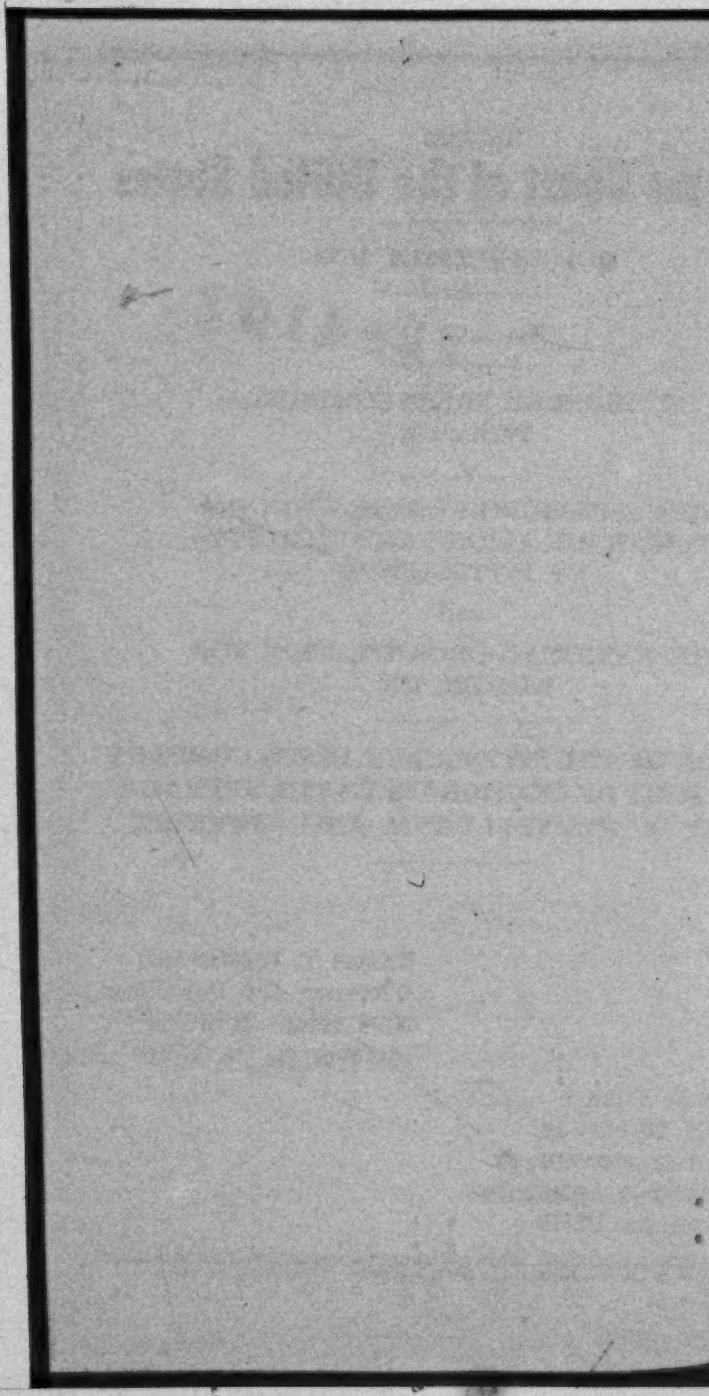

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

PITTSBURGH PRESS COMPANY,
Petitioner.

v.

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS AND THE CITY OF PITTSBURGH,
and
THE NATIONAL ORGANIZATION FOR WOMEN, INC.

## PETITION OF THE PITTSBURGH PRESS COMPANY FOR A WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

*To The Honorable, The Chief Justice of The United States, and The Associate Justices of The Supreme Court of The United States:*

The petitioner, the Pittsburgh Press Company, appellant in the Court below, respectfully prays that a writ of certiorari issue to review the decision of the Supreme Court of Pennsylvania entered in the above case on June 21, 1972, denying the grant of the petition for allowance of appeal to review the Order and decision of the Commonwealth Court of Pennsylvania entered January 27, 1972.

## OPINIONS BELOW

The decision and order of the Pittsburgh Commission on Human Relations of July 23, 1970 finding that the Pittsburgh Press Company violated Ordinance No. 75 of the City of Pittsburgh, as amended by Ordinance No. 395, by aiding in discrimination against women, and ordering that it utilize a classification system of employment advertisements with no reference to sex, is set forth at page R. 1a* of the Appendix filed herewith.

The opinion of the Court of Common Pleas of Allegheny County, Pennsylvania of March 24, 1971 which affirmed the order of the Pittsburgh Commission on Human Relations is set forth at page R. 19a of the Appendix filed herewith.

The opinion of the Commonwealth Court of Pennsylvania of January 27, 1972 modifying the order of the Pittsburgh Commission on Human Relations and the Order of the Court of Common Pleas and affirming said orders as modified, is reported at 4 Pa. Cmwlth 448, 287 A. 2d 161 (1972) and is set forth at page R. 46a of the Appendix filed herewith.

The per curiam opinion of the Supreme Court of Pennsylvania of June 12, 1972 denying the petition requesting allowance to appeal the decision of the Commonwealth Court of Pennsylvania is set forth at page R. 80a of the Appendix filed herewith.

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* References designated by "R." are to pages of the Appendix filed herewith.

## JURISDICTION

The decision of the Supreme Court of Pennsylvania denying the petition requesting allowance to appeal the decision and order of the Commonwealth Court of Pennsylvania was entered on June 12, 1972 by per curiam opinion. (R. 80a) A review of the June 12, 1972 decision will necessarily entail a review of the prior decision and order of the Commonwealth Court of Pennsylvania in this case entered January 27, 1972. (R. 46a). The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. §1257 (3).

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## QUESTIONS PRESENTED

1. Does the ordinance of the City of Pittsburgh prohibiting a newspaper from arranging help-wanted advertisements under columns labeled "Jobs-Male Interest," Jobs-Female Interest," and "Jobs-Male-Female" violate the First Amendment of the United States Constitution?

2. Is it a violation of due process of law under the Fifth and Fourteenth Amendments of the United States Constitution for a newspaper to be found in violation of the City of Pittsburgh Ordinance as aiding advertisers in discriminating against women when no evidence was produced to demonstrate that an advertiser discriminated against women in violation of the ordinance?

---

## CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech; or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fifth Amendment of the United States Constitution provides in part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *

The Fourteenth Amendment of the United States Constitution provides in part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

The case arose on October 9, 1968 when the National Organization for Women, Inc. (N.O.W.) filed a complaint with the Pittsburgh Commission on Human Relations (Commission) charging the petitioner-appellant Pittsburgh Press Company (Press) with violations of Section 8(j) of Ordinance No. 75, as amended by Ordinance No. 395 of the City of Pittsburgh (R. 82a). The Commission found, with one dissenting vote, that probable cause existed to file a complaint, and on November 3, 1969, a public hearing was directed. On January 15 and 16 and February 12 and 26, 1970, hearings were held before the Commission.

At the hearings N.O.W. introduced witnesses who testified at length about the traditional roles of women in the job market and of the discrimination practiced by employers against women. N.O.W. argued that the Press was aiding this discrimination and therefore violating the ordinance in question by arranging its help-wanted advertisements in categories labeled "Jobs-Female Interest" "Jobs-Male Interest," and "Jobs-Male-Female." No evidence was introduced to prove that a female was refused a job advertised under the "Male Interest" classification, or that a male was refused a job classified under the "Female Interest" classification.

In its pleadings and at the hearings before the Commission, the Press repeatedly contended that it was denied due process in that it was accused of aiding in the commission of an unlawful act which was not alleged or proven. The Press also contended and introduced testimony that the classification system it used

was designed solely to maximize reader response by facilitating study of its columns by job seekers, and that the cultural and biological differences between men and women were reflected in general patterns of job preference by them and a newspaper has a right to recognize these preferences in the way it arranges its advertising.

On July 23, 1970 the Commission issued its order providing that the Press must utilize a classification system of employment advertisements with no reference to sex. The Press appealed the order to the Court of Common Pleas of Allegheny County, Pennsylvania. The American Newspaper Publishers Association (ANPA) which had intervened in the Commission proceedings as amicus curiae, was permitted by the Common Pleas Court to again intervene as amicus curiae.

The Press and the ANPA argued that it was a denial of due process of law to find the Press guilty of aiding in any unlawful discriminatory employment practices against females when there was no proof of a single violation of the ordinance by an advertiser of the Press or that a female had ever been denied a job listed under the "Male Interest" column heading because of her sex. The Common Pleas Court found that it was not necessary to prove a specific act of discrimination in order to find that the Press was aiding in an unlawful employment practice. The general designation of sex in the column heading was found to constitute "aiding" in discrimination under the statute without proof a specific discriminatory action by an advertiser (R. 36a).

The Press also argued that it was a denial of its First Amendment rights to require that it not print

help-wanted classified advertisement column headings with any mention of sex. The Common Pleas Court found that such a prohibition is not a denial of First Amendment rights inasmuch as the classified advertisement section of the Press was a commercial rather than editorial aspect of the newspaper and that the Commission's prohibition of the use of any reference to sex in column headings was justified solely on the basis that the general captions referring to male and female were offensive to the ordinance. (R. 43a, 44a) By order dated March 24, 1971 the Court of Common Pleas of Allegheny County affirmed the order of the Commission solely on testimony given at the Commission hearings.

The Press appealed the decision of the Court of Common Pleas to the Commonwealth Court of Pennsylvania. The Commonwealth Court, in a sharply divided opinion, upheld the decisions and findings of the Commission and the Court of Common Pleas, concluding that the Press was not denied due process of law by having found to be "aiding" in discrimination when no specific incident of discrimination by an advertiser was shown. The Court reasoned that since the column heading were per se discriminatory, there need not be a showing that any women actually suffered any act of discrimination (R. 57a).

On the issue of denial of First Amendment rights, the Commonwealth Court held that advertising, per se, does not come within the purview of the First Amendment and that a prohibition from using sex designated want-ad headings was conduct subject to regulation. (R. 65a).

Two judges of the Commonwealth Court dissented, stating that it was a denial of due process of law to find the Press in violation of the ordinance as aiding an employer when no violation by such employer had been alleged or proven (R. 71a, 79a).

The Press petitioned the Supreme Court of Pennsylvania for allowance of appeal to review the decision and order of the Commonwealth Court. By per curiam opinion dated June 12, 1972, the Supreme Court of Pennsylvania denied the petition for allowance of appeal, with one justice of the opinion that the appeal should be allowed to review the First Amendment question presented. (R. 80a).

---

## REASONS FOR ALLOWANCE OF THE WRIT

The Commonwealth Court of Pennsylvania held that it was not a denial of due process of law for petitioner to be found in violation of the ordinance as aiding an employer in discrimination without proof that any such employer violated the ordinance by discriminating against a female in employment, and that the First Amendment did not prohibit a newspaper from being required to arrange its classified help-wanted advertisements in the manner directed by the Commission.

Many newspapers throughout the United States use the same sex designated classification scheme as petitioner. Lower federal courts have already been required to pass upon the First Amendment questions presented by legislation interpreted to prohibit such classification schemes. See *Brush v. San Francisco Newspaper Printing Co.*, 315 F. Supp. 577 (N.D.Calif. 1970); *Greenfield v. Field Enterprises, Inc.*, ... F. Supp. ...., (4 E.P.D. 7763, W.D. Ill. 1972). The constitutional questions of First Amendment Rights raised by the circumstances of this case are of national importance.

Moreover, the problem of what standard of due process is required in the demonstration of the existence of a discrimination in circumstances where no direct discriminatory effect of the challenged activity can be shown presents issues of pressing judicial importance as legislation extends the scope of judicial inquiry into the heart of social institutions and relationships.

The petition for a writ of certiorari should be granted to determine the important issues of due process and First Amendment protection raised by this case.

## ARGUMENT

## ARGUMENT IN SUPPORT OF REASONS

### I

### The Ordinance of the City of Pittsburgh Prohibiting a Newspaper from Arranging Help Wanted Advertisements Under Columns Labeled "Job-Male Interest", "Jobs-Female Interest" and "Jobs-Male-Female" Violates the First Amendment

The Pittsburgh Press Company is of the opinion that the arrangement of help-wanted advertisements under column headings designated "Jobs-Male Interest", "Jobs-Female Interest" and "Jobs-Male-Female" does not discriminate against women, but to the contrary is beneficial to both sexes in that it enables any person to quickly locate possible employment opportunities which are in areas of employment populated more heavily with one sex than another. The column headings are not formulated in the prospect of commercial gain to the Pittsburgh Press Company, but rather are solely a reflection of what it believes to be in furtherance of the most convenient classification for its readers, what is preferred by its readers, and is a classification which has a rational basis in that it merely reflects the present dominant employment interest patterns of the sexes.

The official government view, as set forth by the Pittsburgh Human Relations Commission and the City of Pittsburgh, is that such column headings reflect outmoded social concepts of the social and economic positions of women and are in and of themselves a

device to aid in the repression of the employment opportunities of women deserving of prohibition.

The First Amendment of the United States Constitution forbids the imposition by governmental authorities of a socio-economic set of values which prohibits the Pittsburgh Press Company from arranging its newspaper in a manner which it feels best meets the needs of its readers and which arrangement embodies a commentary of what types of employment may be of more interest to one sex than to another. That embodiment of this commentary in the form of sex designated column headings in the help-wanted sections of the newspaper cannot be regulated by government action to appear only on the editorial pages.

That such column heading may prompt discomfort or dissatisfaction with some women or governmental authorities is not sufficient to prohibit their printing. *New York Times Co. v. United States,* 403 U.S. 713 (1971); *Organization for a Better Austin v. Keefe,* 402 U.S. 415 (1971); *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969).

As stated by the Court in *Terminiello v. City of Chicago,* 337 U.S. 1, pp. 4, 5 (1949):

> * * * The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.
>
> Accordingly a function of free speech under one system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to

anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, [Citation omitted], is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. [Citations omitted] There is no room under our Constitutional for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

The Pittsburgh Press Company does not forfeit its constitutional rights merely because they receive payment for the individual subscribers to the classified help wanted section, as assumed by the Commonwealth Court of Pennsylvania (R. 65a). *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964); *Ginsburg v. United States*, 383 U.S. 463, 474 (1966).

The arrangements and placing of its advertising is a legitimate judgmental function of a newspaper. How to place accent or print an ad invokes editorial judgment; how to arrange whole pages of advertising to best service the readers, even more so. Governmental judgment intrudes upon editorial discretion when it tells a newspaper how to arrange its advertising. This intrusion is not merely a commercial regulation; it substitutes governmental judgment for that of the editor as to how best to serve the reader. Such governmental intrusion should be proscribed.

The fact that the Ordinance has the laudable purpose of eliminating discrimination against women in employment does not provide it with talismanic immunity from constitutional limitations, nor does constitutional protection turn upon "the truth, popularity or social utility of the ideas and beliefs which are offered". *N.A.A.C.P. v. Button*, 371 U.S. 415, 445 (1963).

The order of the Commonwealth Court of Pennsylvania prohibits the Pittsburgh Press Company from utilizing sex designated employment advertising column headings, with the exception that those advertisements certified as exempt by the Pittsburgh Commission on Human Relations may be placed under such otherwise prohibited column headings. Such an exemption may be granted by the Commission pursuant to Section 7(d) of the Ordinance if it is demonstrated that sex is a bona fide occupational qualification for the job in question. (R. 90a)

The effect of this exemption scheme is to force the Pittsburgh Press Company to act as an enforcement arm of the Commission to insure in advance that any advertisement which is placed seeking one sex is in fact entitled to the benefit of the exemption. Such a scheme amounts to a prior restraint on the First Amendment freedoms of the Pittsburgh Press Company. Such attempts to make newspapers screening devices for compliance with governmental commands have a heavy burden of justification not met in the circumstances of this case. *Near v. Minnesota*, 283 U.S. 697 (1931); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Smith v. California*, 361 U.S. 147 (1959).

## ARGUMENT IN SUPPORT OF REASONS

### II

**It is a Denial of Due Process of Law Under the Fifth and Fourteenth Amendments to Find that a Newspaper Aided an Employer in Discrimination in Hiring Solely by Arranging Help-Wanted Advertisement Under Sex-designated Column Headings Without Proof that an Advertiser Discriminated In Hiring in Violation of the Ordinance**

The Commonwealth Court of Pennsylvania concluded that the mere designation of classified help-wanted employment advertisements with column headings "Jobs-Male Interest", "Job-Female Interest" and "Jobs-Male Female" constituted discrimination per se without proof that employers advertising under such headings discriminated in regard to sex in employment in violation of the ordinance:

> If the advertising column headings here are discriminatory, they are in violation of the Ordinance per se, and there need not be a specific "particular" on an actual discrimination suffered by any particular woman. If discriminatory, the column headings were in violation before the first women actually suffered any act of discrimination. [footnote omitted] (R. 57a)

> * * * What is important is that through the use of its arbitrarily selected column headings the Pittsburgh Press "aids" such employees to discriminate. When the Pittsburgh Press arbitrarily arranges and publishes such column headings it is aiding in sex discrimination. (R. 61a)

Two Judges of the Commonwealth Court strongly dissented on the question of whether due process of law was accorded the Pittsburgh Press Company. Judge Mencer stated the following in his dissent:

"The Complaint does not allege any violation by anyone else. It is simply impossible for the Appellant to be guilty of aiding another in the violation of the ordinance when no violation is even alleged and in fact no attempt was made to prove such a violation. It is fundamental that one cannot aid that which did not occur.

"I must conclude that due process clearly requires that, without alleging or proving a violation of the ordinance by an employer who was aided by appellant, the complaint is valid on its face and should be dismissed." (R. 79a)

Judge Crumlish, Jr. made the following observations in his dissenting opinion:

I believe that the factual findings of the Commission, as recited in either the formal findings of fact or the text of the Commission's opinion are not sufficient to support the conclusion that advertising in gender-segregated columns establishes of itself discrimination in employment. Absent proof, Pittsburgh Press cannot be justifiably accused of aiding in an unlawful employment practice. (R. 71a)

* * *

It is most unfortunate and disturbing to me to observe that in this landmark litigation, the adjudicating body has chosen to disregard the evidence presented it; that instead of seeking proof of its position, it has chosen to rely on unsubstantiated

> hunches and feelings. * * * The Commission's opinion and findings of fact do not substantiate their position that gender-segregated advertising is an unlawful employment practice. (R. 75a, 76a)

No matter how strong the current of popular sentiment, it cannot be permitted to displace the constitutional requirement that a violation of an ordinance subjecting the wrongdoer to fines and possible imprisonment (R. 103a) must be substantiated by proof of the wrong alleged. In the zeal to insure the right of women to be free from discrimination, government cannot build the foundation of such equal rights by eroding the basic protections of due process of law:

> It has been long established by the Court that no principle of procedural due process is more clearly established than that of notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused. . . . [*Cole v. Arkansas,* 333 U.S. 196, 201 (1948)]

The Pittsburgh Press has been placed in the position of being found as aiding in the discrimination in hiring of women without knowledge that any advertiser has in fact used its classified advertisements as a device to deny women equal consideration for employment positions. The determination of guilt without knowledge of the unlawful activity was found unconstitutional in *Smith v. California,* 361 U.S. 147 (1959) and should be so determined in this case.

## CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: August 25, 1972

## APPENDIX

### BEFORE THE COMMISSION ON HUMAN RELATIONS
Pittsburgh, Pennsylvania

NATIONAL ORGANIZATION FOR WOMEN, INC.
v.
THE PITTSBURGH PRESS
} FEP 558

### Decision and Order

Stanley Valadez, Eve B. Gugenheim, and Joseph Esper for complainants.

Charles R. Volk, Thorp, Reed, and Armstrong for respondent.

Ralph Lynch, Solicitor of the City of Pittsburgh and Eugene Strassburger III, Assistant City Solicitor for the Pittsburgh Commission on Human Relations.

Gilbert T. Venable for the American Civil Liberties Union and the Allegheny County Council on Civil Rights.

S. Asher Winikoff, Assistant Attorney General and General Counsel, Pennsylvania Human Relations Commission, Commonwealth of Pennsylvania.

Elizabeth Boyer and Mary Jane Moody of the Ohio Bar for the Women's Equity Action League and the National Association of Women Lawyers.

Arthur B. Hanson, W. Frank Stickle, Jr., and Ralph N. Albright, Jr. of the District of Columbia Bar for the American Newspaper Publishers Association.

*Appendix.*

THE PRELIMINARY OBJECTIONS

The Pittsburgh Press filed preliminary objections to the complaint in this proceeding. Therefore, it is appropriate to discuss the several objections first before dealing with the substantive issues.[1]

"1. The complaint is so vague that Respondent is not adequately able to defend it on its merits. It does not meet the requirements of Rule 2(c) of the regulations of the Human Relations Commission."

Due process requires adequate notice and an opportunity to defend. Thus we must examine the prehearing record in this proceeding to determine whether there was such a lack of adequate notice in the complaint and opportunity to defend so as to violate the respondent's rights.

The complaint filed in the within case on October 9, 1969, charges the Press specifically with a violation of Section 8(j) of the Human Relations Ordinance. (This section makes it an unlawful employment practice, inter alia, to aid or participate in the doing of any act declared to be an unlawful employment practice.) The complaint further charges that the practice of "allowing employers to place advertisements in the male or female columns . . . is unlawful."

It is our judgment that the complaint presented to the Press a precise issue: whether the Press by allowing employers to run job advertisements in sex-segregated

---

1. Although the Human Relations Ordinance does not mention "preliminary objections" as a pleading, we have construed the word "answer" to include motions of a preliminary nature.

columns aided said employers in the doing of an unlawful act.

Therefore it is our further judgment that the Press had adequate notice, and as discussed hereinafter, ample opportunity to prepare a defense to the charge thus presented.

On October 17, 1969, a private pre-hearing conference was held between the parties. This was a lengthy meeting and considerable discussion was devoted to the issue above stated. The meeting gave the Press additional notice as to the issue involved in this case.[2]

A meeting was also held between respective counsel prior to the hearing, and prior to hearing witness lists were exchanged between counsel.

From a time standpoint, the Press had considerably more time than the minimum ten (10) days' notice of hearing required by the Human Relations Ordinance. By a letter dated November 7, 1969, the Commission notified the Press that a public hearing had been approved to consider the charge contained in the complaint. On November 10, 1969, the Press received notification that the hearing would be held on December 10, 1969. At the request of the Press, an Order was entered on November 21, 1969, continuing the start of the hearing to January 15, 1970.

---

2. However, one related issue resolved at the meeting of October 17, 1969, related to the Press printing sex designations *within the body of advertisements*. Following the meeting, the Press adopted a policy of removing such sex designations. Thus, the issue was narrowed to the legality of sex designations in the captions of help-wanted columns.

Finally, the Commission granted a two-week recess after the close of the complainant's case, to afford additional time to the Press to prepare its defense.

On the basis of the foregoing, we find no merit in the contention that the complaint was so vague that the Press was unable to prepare a defense, and in particular, we find that the complaint complied with the requirements of Rule 2 of the Commission's regulations.

"2. The complaint does not comply with Rule 2(a) of the Commission's regulations in that neither the complainant, Mr. Gardner, nor the National Organization for Women is aggrieved within the meaning of the Rule."

This objection is dismissed. Rule 2(a) must be read in the light of Section 13(a) of the Human Relations Ordinance.

Section 13(a) specifically provides that a complaint may be filed by the Commission, *or* by an aggrieved person, *or* by an organization which has as one of its purposes the combating of discrimination or the promotion of equal opportunities. The ordinance provides alternative classes of complainants by its very language. We further take notice of the fact that the National Organization for Women has as one of its primary purposes combating discrimination and the promotion of equal opportunities; thus it qualifies as an "organization" within the meaning of Section 13 (a) supra.

"3. The complaint alleges a violation of Section 8(j) of the Human Relations Ordinance. Section 8(j) makes it an unlawful employment practice

'. . . to aid, incite, compel, coerce, or participate in the doing of any act declared to be an unlawful employment practice or to obstruct or prevent any person from enforcing or complying with the provisions of this ordinance or any rule, regulation or order of the Commission, or to attempt directly or indirectly to comit any act declared by this ordinance to be an unlawful employment practice.'

"The complaint does not allege any violation by any other person. The Respondent cannot be guilty of aiding, etc., another in the violation of the ordinance when no such violation is proved or even alleged. One cannot aid that which did not occur. Neither does the complaint state or allege that the Respondent as an employer is itself violating any provision of the ordinance. Respondent contends that without alleging or proving a violation of the ordinance by an employer which was aided, etc. by Respondent, the complaint is invalid on its face and must be dismissed."

The complaint does charge that the Press allows employers to insert advertisements in male or female columns, and that such practice is unlawful.

As a necessary step in adjudication of this case, the Commission must determine whether the action of an employer in causing an advertisement to be placed in a sex-segregated column itself violates the ordinance.

Therefore, this objection will be disposed of hereinafter in the discussion of the merits of this case.

"4. The chief allegations of the complaint seem to be a failure to accede to the requests of the complainant or NOW. This does not constitute a violation of laws

and therefore the complaint does not state a cause of action upon which relief can be granted."

We agree that the complaint would fail to state a cause of action if it only alleged a failure to accede to NOW's requests. However, as stated heretofore, the complaint states more and it is our judgment that the complaint does state a cause of action. Thus, we find no merit in this objection.

"5. The Human Relations Ordinance contains numerous exemptions and exceptions. The complaint does not indicate whether the acts complained of were without those exemptions and if so—how."

There is no necessity for a complaint filed in a proceeding before this Commission to include a statement or discussion of possible defenses available to a respondent. Exemptions and exceptions contained in the ordinance would be matters of possible defense and should not be anticipated in a complaint.

"6. The complaint is an effort to regulate the method of presenting want-ads to suit reader preference. Such regulation would constitute an abridgement of freedom of the press in violation of the First Amendment to the Constitution of the United States of America."

For reasons stated herein, we do not view this proceeding as an effort to regulate want-ads to suit reader preference. To the contrary, the proceeding deals with the legality of the Press's system of employment want-ad classification under the Human Relations Ordinance.

The Human Relations Ordinance is a valid enactment of the City of Pittsburgh within the authority con-

ferred upon the City by the Act of March 7, 1901, P.L. 20, Article XIX, Sec. 3, Clause XLIII, *City of Pittsburgh v Plumbers Local Union No. 27*, 113 P.L.J. 7, 1965; *Stanton Land Company et al v. City of Pittsburgh*, 111 P.L.J. 9, 1963.

Therefore, if the Pittsburgh Press has violated the Human Relations Ordinance, the First Amendment would not be available as a defense to such a violation. Want-ads represent a form of purely commercial advertising subject to compliance with a lawful ordinance. *Valentine v. Chrestensen*, 316 U.S. 52 (1942). *Directory Publishing Company v. City of Pittsburgh*, 211 A. 2d 509, 205 Pa. Super 423 (1965).

"7. Nothing in the ordinance prohibits directly or through implication the classification of help-wanted advertising and reader interest groupings and the complaint is therefore void on its face."

This objection raises the very issue involved in this case and will be disposed of hereinafter.

## ADJUDICATION

This case, which is one of first impression in the United States, involves two inter-related issues as follows:

1. Whether an employer, by causing a help-wanted advertisement to appear in a sex-segregated column, violates the Human Relations Ordinance.

2. Whether the respondent Pittsburgh Press, has violated the Human Relations Ordinance by allowing employers to place help-wanted advertisements in sex-segregated columns.

*Appendix.*

An adjudication of the first issue is, of course, fundamental to an adjudication of the second issue. The Human Relations Ordinance, No. 75 of 1967 of the City of Pittsburgh, as amended by Ordinance No. 395 of 1969, provides in Section 8(e) thereof that it is an unlawful employment practice:

> "For any employer, employment agency, or labor organization to publish or circulate, or to cause to be published or circulated, any notice or advertisement relating to employment or membership which indicates any discrimination because of race, color, religion, ancestry, national origin or place of birth or sex."

The Press argues that its system of segregating employment want-ads is not unlawful discrimination, but rather a convenience to its readers. The Press's relevant columns are headed "Jobs-Male Interest" and "Jobs-Female Interest." In addition thereto the Press runs a disclaimer statement at the beginning of the male want-ads and at the beginning of the female want-ads as follows:

> "Notice to Job Seekers"
>
> "Jobs are arranged under Male and Female classifications for the convenience of our readers. This is done because most jobs generally appeal more to persons of one sex than the other. Various laws and ordinances—local, state, and federal, prohibit discrimination in employment because of sex unless sex is a bona fide occupational requirement. Unless the advertisement itself specifies one sex or the other, job seekers should assume that the advertiser will consider applicants of either sex in compliance with the laws against discrimination."

Discrimination is defined in Section 4(b) of the Human Relations Ordinance, as any difference in treatment based on inter-alia sex.

An employer by causing an employment advertisement to be placed in either the male interest column or the female interest column is, in our judgment, indicating a difference in treatment as to that employment based upon sex, hence engaging in unlawful discrimination.

Indeed it was admitted at the hearing by Mr. Robert Seli, Classified Ad Manager for the Press, that employers run ads in a particular column depending upon what sex they want for the job, thus clearly indicating an unlawful difference in treatment in violation of Section 4(b) supra.

"Q. —Is this the only type of—if I may use the word—education for your advertisers? Do you then proceed to tell them of the several categories that should go under this or that, take your choice?

A. —We tell them where the majority is—or we try to find out what type of person they are looking for. Are they looking for a man, or are they looking for a woman? They know this. And they are interested or more interested in a man or more interested in a woman. They know this, and they state this. This is where they want it.".

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Further and in addition to Mr. Seli's admission, the necessary implication of the segregated columns is that men are given preference for jobs in one set of columns,

and women are given preference for jobs in the other set of columns. This is supported by the fact that the Pittsburgh Press runs a third section of employment advertisements, "male-female." Clearly, jobs found in this section are available to men or women without discrimination.

> The presence of the "disclaimer" does not materially change the discriminatory nature of the classification system. In essence the present system with the use of the "disclaimer" and the word "interest" is a continuation of the prior classification system.

We recognize that must testimony was introduced by the parties on the question of job preference by sex. However, the issue of sex preferences and employment and reader convenience related to such preferences is not germane, since the Human Relations Ordinance prohibits discrimination in employment based upon sex, notwithstanding the interest or lack thereof of one sex or the other in particular occupations.

In support of the conclusion we have reached on this issue, we also take notice that certain jurisdictions have found that sex-segregated employment columns are per se unlawful, and have issued regulations or guidelines prohibiting such advertising:

The New York City Law on Human Rights, N. Y. Adm. Code Chapter 1, Title B., Sec. B 1-70 (d) is legally the same as Section 8(e) of the Pittsburgh Ordinance quoted at length above. Pursuant to that section, New York City has issued the following regulation:

"The placement of job advertisements under separate "Male" or "Female" Column Headings violates the law unless there is a bona fide occupational qualification

for the position advertised. All newspapers that publish classified advertising are expected to comply with this ruling."[3]

The Pennsylvania Human Relations Act, 43 P.S. 955 (b) (2) contains language very similar to Section 8(e) of the Pittsburgh Ordinance aforesaid. We take notice that Pennsylvania has determined that sex-segregated columns violate the State Act. On December 1, 1969, pursuant to an action taken by the Pennsylvania Human Relations Commission, notices were directed to "Classified Advertising Managers of Pennsylvania Newspapers."

"Accordingly, it is an unlawful discriminatory practice for any publication—

2. to classify help-wanted advertisements under column headings such as Male, Female, Female-Interest, or Male-Interest."

The same result has been reached by the Civil Rights Commission of Colorado, the U. S. Equal Employment Opportunity Commission, and the Nebraska Equal Opportunity Commission. On June 9, 1970 the U. S. Department of Labor, issued Sex Discrimination Guidelines, amending Chapter 60 of Title 41 of the Code of Federal Regulations, by adding a new Part-60-20. Section 60-20.2 provides in sub-section (b) thereof that the placement of an advertisement in columns headed

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3. Newspapers published in New York City have complied with this regulation. See in particular the New York Times, the Wall Street Journal, and the New York Law Journal. All have converted to a system of listing jobs alphabetically, instead of under columns headed by sex designations.

"Male" or "Female" will be considered an expression of discrimination based on sex.

Therefore, on the basis of the foregoing, we conclude that advertisers, by placing ads in columns captioned by sex, are indicating a discrimination on the basis of sex in violation of Section 8(e) of the Human Relations Ordinance.

Thus having found that it is a violation of the Ordinance for an employer to place an advertisement in a sex-segregated column, the issue remaining is whether the Press aids or participates in the commission of the violation.

As argued by the National Association of Women Lawyers in its brief:

> "There is no unusual legal meaning to words such as 'aid' or 'participate.' 'To aid means to give help or support, to further facilitate, assist, contribute to, be of use, help. U. S. vs. 2000 Plastic Tubular Cases 231 F. Supp. 236, 239 (M. D. Pa. 1964).' Without the aid and participation of the Pittsburgh Press, advertisements could not be published in its daily classified sections with sexually-segregated headings. It is the newspaper rather than the advertiser that selects the language of column headings for its classified pages."

We accept this argument. As Mr. Seli stated:

> "Q. — Mr. Seli, with reference to job opportunity, does the Press offer anything other than what is shown on this tear sheet with reference to classification?
>
> A. — Yes. We have 'jobs-male interest.' We have

'commission sales-male interest,' 'male or female help' — this is a combination classification and 'jobs-female interest' and 'commission sales-female interest.' These are the basic five classifications."

Pg. 17, N.T. Feb. 12, 1970

The Press, as a matter of policy, has created and continues a system of classification; and permits and allows the utilization of that system. We believe that by this action the Press is aiding advertisers in the aforementioned violation. Indeed, advertisers have little choice, since they have only certain columns within which to run advertisements.

The Press argues that certain employers are not covered by the Ordinance, and further that the Ordinance allows for certain positions to be exempted or given a so-called "bona fide occupational exemption." The Press argues that a burden would be placed upon it to check to see whether an employer is covered by the Ordinance or if the position to be advertised is exempt. Finally, the Press submits that the Ordinance does not require the imposition of such a burden.

First, let us note that the burden of establishing exemption is upon the employer. The Press need only ask the advertiser if it has an exemption. Section 7(d) of the Ordinance provides that a person may request an exemption certificate. (In the 18 years that Fair Employment Practices legislation has been in force in this City, only two such requests have been made, and both were declined, and no such request has been made since the sex amendment in 1969.)

The Press argues that Section 8 of the Human Relations Ordinance is void for vagueness, in that bona

fide occupational qualifications is not defined, and the Press would be required to speculate as to the meaning.

For the reasons stated hereinabove, we submit there is no need for the Press to speculate, since there is no requirement on the Press to determine whether a position should be granted exempt status.

Section 8 must be read in connection with Section 7(d) which sets forth the procedure for certification of a job as exempt from the operation of the Ordinance by the Pittsburgh Commission on Human Relations. It is our judgment that Section 7(d) sets forth sufficient standards for the Commission to determine whether the position in question should be exmept. The test set forth in Section 7(d) is whether an occupation reasonably requires the employment of a person of a particular race, color, religion, ancestry, national origin, place of birth, or sex. With the standard established, and with no burden on the Press to decide exempt status, we see no basis for objection on vagueness.

*Brush vs. San Francisco Newspaper Printing Company,* U. S. Dist. Ct. San Francisco, No. C-70 102, June 12, 1970 is not controlling. The issue therein was whether a newspaper was included as an employer, employment agency, or labor union, within the mean- of the 1964 Civil Rights Act, Title 42 U.S.C. Sec. 2000 E-3(b). Clearly this is not the issue in this case. No claim has been made that the Pittsburgh Press is an employer, employment agency, or labor union, within the meaning of the Ordinance.

Finally the Press argues, that the complaint involved violates the Commission's Rule 2(c) (5) in that the complaint alleges the violation occurred "on or

about September 10, 1969 and before." Rule 2(c) (5) states that, if the alleged unlawful discriminatory practice is of a continuing nature, the dates between which said continuing acts of discrimination are alleged to have occurred must be stated.

Rule 2(c) (5) requires that the complainant state the date or dates to the best of the complainant's knowledge and information. What is challenged in this case is a system of classification, which the Press did use on September 10, 1969. Further the Press used that system for so many years before, that the complainant should not be required to state the date when this system was first implemented. Finally the Press has continued to use that system, with the modifications discussed above since September 10, 1969 to date.

We find no violation of Rule 2(c) (5).

FINDINGS OF FACT

1. The Pittsburgh Press is a newspaper of general circulation, and is engaged in business as a newspaper within and without the City of Pittsburgh.

2. The National Organization for Women is an organization which has as one of its purposes combatting discrimination on the basis of sex. The Pittsburgh Chapter of the National Organization for Women has an office within the City of Pittsburgh.

3. In 1969, the Pittsburgh Press ran a total of 248,000 help-wanted advertisements in its daily and Sunday editions.

4. Of this advertising, 25 per cent is placed by advertisers based in the City of Pittsburgh.

5. The Pittsburgh Press permits the advertiser to select the column within which its advertisement is to be inserted.

6. When an advertiser does not indicate a column, the Press asks the advertiser whether it wants a male or female for the job and then inserts the advertisement in the jobs-male interest or jobs-female interest column accordingly.

7. Prior to October of 1969, the Pittsburgh Press carried headings or captions on its relevant employment columns as follows: "Male Help Wanted," "Female Help Wanted," and "Male-Female Help Wanted."

8. From October of 1969 to the present time, the captions read: "Jobs-Male Interst," "Jobs-Female Interest," and "Male-Female."

9. The Pittsburgh Press is an agent for the Pittsburgh Post-Gazette in the processing of employment advertisements.

10. The Pittsburgh Press is the twelfth largest classified advertisement newspaper in the United States. The approximate circulation of the Pittsburgh Press daily is 350,000 and on Sunday 750,000.

CONCLUSIONS OF LAW

1. The Pittsburgh Commission on Human Relations has jurisdiction of this case.

2. The Human Relations Ordinance is constitutional generally, and in its application to the facts of this case.

3. It is an unlawful employment practice for an employer, employment agency, or labor organization to

cause to be published an employment advertisement in a newspaper column, which column contains a caption with a designation as to sex.

4. The Pittsburgh Press is in violation of the Human Relations Ordinance, specifically Section 8(j) thereof, by maintaining a classification system of employment advertisements with captions containing designations as to sex.

5. The Ordering of the Pittsburgh Press to cease and desist violation of the Human Relations Ordinance is necessary and proper to effectuate the purposes of the Human Relations Ordinance.

6. Preliminary Objections may be filed to a Complaint under the Human Relations Ordinance.

7. The within Complaint is not unlawfully vague and meets the requirements of Rule 2 of the Pittsburgh Commission on Human Relations.

8. The within Complaint states a cause of action.

*Appendix.*

**Order**

**And Now, to wit, this 23rd day of July, 1970, in accordance with the foregoing discussion, findings of fact, and conclusions of law, it is ordered, adjudged, and decreed that:**

1. **The Pittsburgh Press shall, within thirty (30) days from the date of this Order, cease and desist from violating Section 8(j) of Ordinance No. 75 of 1967, as amended, and that**

2. **The Pittsburgh Press shall, within thirty (30) days from the date of this Order, utilize a classification system of employment advertisements with no reference to sex.**

**Pittsburgh Commission on Human Relations**

**By T. Z. Korsak**

IN THE
COURT OF COMMON PLEAS OF ALLEGHENY COUNTY
PENNSYLVANIA — CIVIL DIVISION

| | |
|---|---|
| APPEAL OF THE PITTSBURGH PRESS COMPANY FROM THE ORDER OF THE PITTSBURGH COMMISSION ON HUMAN RELATIONS AT FEP CASE NO. 558 | No. S.A. 768 of 1970. |

## Opinion

MARTIN, J.

This is an appeal from the decision and order of the Commision on Human Relations of the City of Pittsburgh ("Commission") dated July 23, 1970. The appeal by the Pittsburgh Press Company ("Press") was filed on August 2, 1970. Oral arguments were heard, and the various interested organizations were given an opportunity to file additional, supplemental and reply briefs.[1]

1. Six attorneys presented oral arguments to the court. Seven briefs have been filed and three supplemental and reply briefs have also been filed. The American Newspaper Publishers Association represents a membership of 1000 daily newspapers and filed a brief as *amicus curiae*. Another *amicus* brief has been filed on behalf of The Allegheny County Council on Civil Rights, The University Committee for Women's Rights, The Council for Women's Rights, and The American Civil Liberties Union, Greater Pittsburgh Chapter. Briefs were also received from The Women's Equity Action League (WEAL); The National Organization for Women (NOW); The Equal Employment Opportunity Commission (EEOC) in addition to those filed by The Pittsburgh Press Company, and the City of Pittsburgh.

*Appendix.*

Hearings were held before the Commission on four different days in January and February, 1970, at which time twelve witnesses testified. The decision of the Commission determines preliminary matters of law, contains discussion, finding of fact, conclusions of the law and an order. The record of the proceedings before the Commission has been transcribed and lodged with the court.[2]

By its adjudication, the Commission determined that the system of employment advertisements used by the Press in the publication of its daily newspaper is in violation of the provisions of the Human Relations Ordinance of the City of Pittsburgh. The Press classification system publishes employment opportunities under headings which designate job preference by sex. These designations as to sex, male and female, appear daily in the newspaper column captions.

The Press contends that there is not sufficient evidence that its method of employment advertisements does violate the ordinance of the City of Pittsburgh. The Press also contends that its rights under the Federal Constitution and the Constitution of this Commonwealth have been violated in the proceeding before the Commission.

This is the first time that a state court has been required to rule upon the legality of sex classification in the help-wanted advertising sections of a newspaper[3]

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2. The transcript of testimony before the Commission will be directed to be filed and to be made part of the record before this court.

3. Two Federal Cases have discussed federal statutes. These cases are not controlling on the issues

The matter is now presented for determination pursuant to the *Local Agency Law of 1968*, December 2, P. L. .... No. 353; (53 P.S.-Supp. 11301 et seq.) The *Local Agency Law* sets forth the standards by which this court must review the proceedings in Section 8 thereof (53 P. S.-Supp. 11308).

On October 9, 1969 the National Organization for Women (NOW) filed a complaint with the Commission whereby the Press was accused of discriminatory practice relating to employment. In the complaint the Press was charged with deliberate and constant violations of Section 8 (j) of the Human Relations Ordinance of the City of Pittsburgh ("Ordinance"): Ordinance No. 75, approved February 28, 1967, as amended by Ordinance No. 395, approved July 7, 1969.

The complaint sets forth that the Press . . . "policy of allowing employees to place advertisements in the male or female columns, when the jobs advertised obviously do not have bona fide occupational qualifications or exceptions, is unlawful".

The Press filed an answer to the complaint which contains factual allegations which are undisputed, and also contains legal objections to the complaint. Prior to the filing of the answer an informal meeting was held with representatives of the Press and the Commission present. The Commission ordered a public hearing. On January 8, 1970, The American Newspaper Publishers Association (ANPA) was permitted to intervene in the proceedings as *amicus curiae*.

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here presented. *A.N.P.A. v. Alexander*, 294, F. Supp. 1100 (D. C., 1968); *Brush v. San Francisco News Printing Co.*, .... F. Supp. .... (N. D. Cal., 1970).

*Appendix.*

After hearing, the Commission made findings of fact which can be briefly summarized as follows:[4]

"The Pittsburgh Press" is a newspaper of general circulation inside and outside of the geographic limits of the City of Pittsburgh. NOW is a national organization with an office in the City which has as one of its purposes combating discrimination based on sex.

The Press published 248,000 help-wanted advertisements in the daily and Sunday editions of its newspaper during the year 1969. Because of the scope of classified advertisement of this newspaper it is the twelfth largest classified advertiser in the United States. Only twenty-five per cent of the help-wanted advertisements published by the Press are placed by advertisers located in the City of Pittsburgh. The Press acts as the agent for the "Pittsburgh Post-Gazette" in the processing of employment advertisements.[5]

Prior to October, 1969, the Press published captions for its help-wanted columns as "Male Help Wanted", "Female Help Wanted" and "Male-Female Help Wanted". A change in the captions of its help-wanted columns was effective in October, 1969. From October, 1969 to the present time the Press published captions on its help-wanted columns as "Jobs-Male Interest". "Jobs-Female Interest" and "Male-Female".

The Press permits all of its advertisers to select the proper placement of want-ads within captioned columns.

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4. The findings of fact made by the Commission are contained in the adjudication and are numbered 1 thru 10.

5. The "Pittsburgh Post Gazette" is a newspaper of general circulation published six days each week.

If the advertiser does not designate where a want-ad should be placed, the Press requests such designation and then publishes the ad in the properly captioned column.

In its adjudication the Commission made Conclusions of Law: The order of the Commission dated July 23, 1970 directs that the Press cease and desist from violating Section 8 (j) of the Ordinance and that:

> "The Pittsburgh Press shall, within thirty (30) days from the date of this Order, utilize a classification system of employment advertisements with no reference to sex"

There is substantial evidence to support each of the enumerated findings of fact made by the Commission. The difficult issues which must be decided all arise from the conclusions of law and the order of the Commission. Although other issues are presented and must be decided, three of the eight conclusions of law present the key to the adjudication of the Commission. These three conclusions of law are as follows:

> "3. It is an unlawful employment practice for an employer, employment agency, or labor organization to cause to be published an employment advertisement in a newspaper column, which column contains a caption with a designation as to sex.
>
> 4. The Pittsburgh Press is in violation of the Human Relations Ordinance, specifically Section 8 (j) thereof, by maining a classification system of employment advertisements with captions containing designations as to sex.
>
> 5. The Ordering of the Pittsburgh Press to cease and desist violation of the Human Relations Or-

dinance is necessary and proper to effectuate the purpose of the Human Relations Ordinance."

In effect the Commission decided that there was a violation of Section 8(j) of the Ordinance by the use of any general sex designated column headings in the classified employment section of the Press without regard to any requirement of the law. This is the contention of both the Press and ANPA.

One of the issues to be decided is whether the use of any sex designation in column headings of classified employment advertisement is properly prohibited by the Commission.

The other issues presented for determination involve Constitutional questions. It is contended that the proceedings before the Commission has resulted in violation of the Constitutional requirements of Due process for several reasons. It is also contended that the action of the Commission wrongfully infringes upon an area of Constitutional right protected by the First Amendment to the Constitution of the United States to-wit: freedom of the press. The issues presented by the appeal will each be discussed separately.[6]

Before the substantive issues can be properly decided an understanding of the Ordinance is necessary. The Human Relations Ordinance, No. 75, Feb. 27, 1967,

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6. The Press filed a Petition for Appeal to this court. An "Answer and Counter-Claim" was filed by the City of Pittsburgh on behalf of the Commission on Human Relations. The "Counter-Claim" was not mentioned at the oral argument or in the brief. There does not appear to be any authority to permit a "Counter-Claim" to an appeal under the *Local Agency Law*. This "pleading" is disregarded by the court.

as amended by Ordinance No. 395, July 3, 1969, of the City of Pittsburgh closely follows certain sections of the *Pennsylvania Human Relations Act,* 1955, Oct. 27, P. L. 744 as amended, (43 P. S. 951). Sections of the Ordinance here involved dealing with unlawful descriminatory practices correspond in many areas to the exact language of Section 955 to the above statute (43 P. S.-Supp. 955). All of the briefs do make repeated reference to the Federal legislation which similarly pertains to equal employment opportunity: Title VII, *Civil Rights Act of 1964,* (42 USC 2000 e).

Fundamentally, the Federal and State statute, as well as the local Ordinance, prevent those subject to the legislation from discrimination against any individual solely on the basis of that individual's race, color, religion, *sex,* or national origin cf., 42 U.S.C. 2000 e-2 (a) with 43 P.S.-Supp. 955 (a). In each the action of any covered employer, labor organization or employment agency who discriminates is determined to be an unlawful employment practice. In each statute the word "sex" is used in the same phrase as the other applicable terms.

One of the confusions presented by the instant appeal is that the statutes the word "sex" is treated the same as the words race, color, religious creed, ancestry, age, or national origin. There are some obvious biological differences between male and female which many say requires and justifies a difference in treatment. This difference is recognized by the Pennsylvania statute which sets forth discrimination in employment is unlawful "unless based upon bona fide occupational qualification" (43 P. S. 955). The same

difference is recognized in the Ordinance here involved (Ordinance, Section 8, infra).

Regardless of the biological differences, however, we start with the clear policy of the law that discrimination solely on the basis of sex is as bad as discrimination on the basis of race, color, religion or national origin.

By all of the legislation in this area, federal, state and local, there may be different treatment on the basis of sex and this is discrimination. In order for such discrimination to be legal or permissable it must be discrimination based upon a sound reason. Any difference in treatment on the basis of sex to be legally sanctioned must not undermine the clear policy of nondiscriminatory treatment already referred to. Any discrimination in employment on the basis of sex must be legally sanctioned as a "bona fide occupational qualification" ("BFOQ").

It is equally clear that the Commission made no determination that the Press was guilty of discrimination in any of the three specific categories covered by the law. The Press is not found guilty of discrimination as an "employer", or as a labor organization" or as an "employment agency", as those terms are used in the Federal, State and local legislation. The complaint was not addressed to such a determination.

The entire thrust of the complaint and the decision of the Commission is that the Press is guilty of aiding employers, labor organizations and employment agencies *who are* engaged in unlawful employment practices. The unlawful practice of which the Press is

guilty is the publication of sex designation in job classifications.

While one of the *amicus* now argues that the Press could be construed to be an "employment agency", to so hold would be outside thescope of the proceedings before the Commission.[7]

To now permit a change in the theory of the complaint and decision in effort to justify the action of the Commission would support the contention of the Press that the complaint was too vague to be defended.

Section 8 of the Ordinance is applicable to the issues of this appeal. The pertinent language of this section of the Ordinance sets forth:

> "It shall be an unlawful employment practice . . . except where based upon a bona fide occupational execption certified by the Commission in accordance with Section 7, Subsection (d) of this Ordinance:[8]
>
> (e) For any employer, employment agency or labor organization to publish or circulate, or to cause to be published or circulated, an notice or

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7. While not passing on the merits of this contention it is noted that a Federal District Court has recently decided that a newspaper is not an "employment agency" as that term is used in the *Civil Rights Act of 1964*: *Brush v. San Francisco Newspaper Printing Co.*, F. Supp.—(U.S.D.C. No; Calif. 1970).

8. Section 7, subsection (d), given to the Commission the power to certify upon the request of any person an exemption from the provisions of the Ordinance as a bona fide occupational requirement.

advertisement relating to employment or membership which indicates any discrimination because of race, color, religion, ancestry, national origin or place of birth or sex.

(j) For any person, whether or no an employer, employment agency or labor organization *to aid*, incite, compel, coerce or participate in the doing of any act declared to be an unlawful employment practice by this ordinance, or to obstruct or prevent any person from enforcing or complying with the provisions of this ordinance or any rule, regulation or order of the Commission, or any attempt directly or indirectly to commit any act declared by this ordinance to be an unlawful employment practice."

It has been noted that in some regards Section 8 of the Ordinance closely follows the State Legislation. (*Human Relations Law*, supra, Section 5 as amended, 43 P. S.-Supp. 955). The above provisions of the Section 8 (e) of the Ordinance are comparable to Section 5 (b) (2) of the State Statute (43 P. S.-Supp. 955 (b) (2). Likewise, Section 8 (j) of the Ordinance, set forth in full above, finds a like provision in the statute, supra (Section 5 (e), 43 P. S.-Supp. 955 (e).

Within the context of employment advertising, Section 8 (e) of the Ordinance forbids certain employers, employment agencies, and labor organizations from indicating in any advertisement a discrimination on the basis of sex, in addition to other bases not herein relevant. It is important to note that Section 8 (j) of the Ordinance applies to "any person", and not

just to employers, employment agencies and labor organizations. (See also, Section 5 (e), supra).

It is also important to recognize that several exemptions are provided in the Ordinance. Section 4 (c) specifies that employers with less than five employees are not covered by the Ordinance. Section 3 provides that only unlawful employment practices committed within the territorial limits of the City of Pittsburgh are proscribed by the Ordinance.

An exception, already referred to, is set forth in Section 8, which provides that a covered entity may discriminate on the basis of sex in denying employment, if sex is a "bona fide occupational qualification" for the particular duties. As a result of this exemption, then, an employer covered by the Ordinance may decline to hire an individual solely on the ground of the prospective employee's sex, provided, however, that sex is a "bona fide occupational qualification" for the job. However, such exceptions (BFOQ) must be granted by the Commission after application in accordance with Section 7 (d) of the Ordinance.

The Commission seeks to bring the Press under the Ordinance through Section 8 (j). This is sought to be accomplished by the determination that a newspaper may be guilty of aiding or participating in discrimination by placing advertisements under sexually designated columns on behalf of its customers who may be employers, employment agencies or labor organizations covered by the Ordinance. The Commission interprets Section 8 (j) to mean that the maintenance of sexually designated column heading offends the Ordinance and makes the newspaper publisher an "aider or abettor" of an unlawful employment practice.

Organizations such as NOW may petition the Pittsburgh Commission on Human Relations for relief under Section 13 (a).[9] The aggrieved party must file a signed, written complaint setting out the person and his address who allegedly committed the unlawful employment practice. Section 13 (b). In this written complaint, the particulars of the alleged unlawful employment must be set forth.

While some proponents of "Women's Liberation" may seek to abolish all differences between the sexes this not before the court.[11] The issue before the court is whether there is invalid difference in treatment in employment opportunity not sanctioned by law through the use of the general male and female captions. Any such invalid treatment on the basis of sex should not be sanctioned because it may result in invideous economic discrimination as well as unequal opportunities for personal attainment on the basis of a person's sex. The court is not interested in changing our culture to conform to some found in the South Pacific as some women's liberators seem to hope. Recognizing that male and female differences exist, the issue is whether there is invalid discrimination in employment opportunities on the basis of sex.

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9. Section 13 (a) provides that such a complaint may be initiated by the Commission, by an individual or an organization having one of its purposes the combating of discrimination. The complaint in the instant case was initiated by NOW, one of the organizations embraced by Section 13 (a).

11. Some female opponents of "Women's Liberation" want to take advantage of the inequality in the sexes recognized in our culture and manners, but this is not before the court.

The liberty which is guaranteed in our free society has long included recognition that the right to employment is included therein. *Commonwealth v. Samuel S. Brown,* 8 Pa. Super. Ct. 339 (1898); *Traux v. Raich,* 239, U. S. 33, 41 (1915). Difference in treatment may be unlawful if there is no valid basis for such discrimination *Morey v. Doad,* 354, U. S. 457, 77S. Ct. 1344 (1957). See also, Ordinance Section 4 (b).

The proceedings before the Commission have all been in accordance with the foregoing terms of the Ordinance of the City of Pittsburgh.

It should be clear that the Order of the Commission is limited to the prohibition of column captions on the general basis of sex and is not directed toward the body of the ad. Thus, where sex, race, creed, national origin, or religion is a bona fide occupational qualification for a particular job, the body of the advertisement could include sufficient information to indicate the special nature of the position. The Order of the Commission does not prohibit the use of adequate job descriptions, or classification of help wanted advertising into occupational categories for reader and employer convenience.

The brief of the City of Pittsburgh sets forth the example that under previous Commission rulings, an ad headed "Catholic Stenographer" would constitute discriminatory advertising, but guidelines for the Commission and other Human Relations Agencies would permit an advertisement stating "Stenographer for Catholic Diocesan Office".

If there is a vacant position for an attendant for a male rest room, the employer may seek an occu-

pational certification. However, even without such certification, an advertisement which stated "Attendant for Male Rest Room" might be permissable. Likewise, in job opportunities for actors, actresses, dancers and similar categories sex may be a necessary prerequisite. In that event the requirement of sex could be clearly stated in the body of the advertisement.[10]

The evidence establishes that the Press requests that its advertisers indicate a preference as to where any employment ad is placed. There was no evidence offered to show that the preference of the advertisers is based in any way upon any specific bona fide occupational qualifications as certified by the Commission or based upon any exemption or exception to the operation of the terms of the Ordinance.[12] Nor is there evidence that the Press questions its advertisers about any exceptions when it requires that a preference *be* designated.

It has been noted that the clear policy of the law is to preclude unlawful difference in treatment in employment based upon sex unless such different treatment is warranted for good reason. The Press contends that the sex classification is justified, desirable and dictated by

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10. New York Newspapers have eliminated columns classified on the basis of sex and have not created havoc in the entertainment industry in that city. This court does not have before it a ruling which governs content of advertisement.

12. The findings of the Commission indicate a change in the three designations of column headings used in 1969. There was a change from "Female Help Wanted" to "Jobs-Female Interest", etc. The court fails to see any difference in the legal affect of the change in terminology nor is any argued.

reader preference. However, in reality the testimony of the employee of the Press clearly established that it is not the preference of the reader, but the preference of the prospective employer which dictate ad placement under one caption or another.[13] The disclaimer of unlawful discrimination published by the Press is not effective to establish compliance with the policy against unlawful discrimination and this is not argued or briefed.

Both the Press and the ANPA contend that the determination by the Commission that the present classification violates the Ordinance is erroneous, but for different reasons.

The evidence before the Commission establishes that at least one customer had increased costs of advertising because of duplication of ads in both male and female columns. There is evidence about tests and studies from which the Commission could conclude that the more attractive employment opportunities consistently appear in the male classification. There is evidence that the classification system used by the Press discourage women from application for jobs classified for male interest.[14]

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13. The classification system is similar in result to the "separte but equal" doctrine set forth in *Plessy v. Ferguson,* 163 U. S. 537, 16 S. Ct. 1138 (1966), and now discredited. It was long contended that blacks preferred separate accommodation just as readers prefer different captions by sex. See also, *Loving v. Virginia,* 383 U. S. 1 at 8, S. Ct. 1317 (1967), as to equal application theory in penal laws.

14. Transcript, Leland P. Deck, pp. 45-55, (1/15/70) Transcript, Catherine West, pp. 84, (1/15/70) Transcript, Barbara Cloud, pp. 106-108, (1/15/70) Transcript, Sandra Bem, pp. 13-15, (2/26/70)

All of the testimony has been reviewed. There is substantial evidence from which the Commission could determine that the system which the Press seeks to sustain does aid in discrimination in employment based upon sex, and not based upon difference in treatment sanctioned by the law.[15] The conclusion is reached after full consideration that there are biological and psychological differences between male and female which may be the proper basis for differences in employment. The question remains as to whether when we take all of the above to be true, the action of the Commission is proper under the law.

The Press contends that there is no substantial evidence in the record of a single violation of the Ordinance by a specific employer, employment agency or labor organization and that such proof is necessary as a matter of law. [16] It is true that there is no substantial evidence that a designated advertiser in the Press is guilty of unlawful discriminatory practice in employment. The theory of the Press is that in the absence of evidence that a specific advertiser did use its columns and was guilty of an unlawful discriminatory practice there can be no order restraining the Press.

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15. We agree with the Press that much of the testimony before the Commission is of no probative value in the determination of the issues.

16. These arguments go to the validity Conclusions of Law Nos. 3 and 4. This is the foundation also for the Press and the ANPA argument that to sustain the position of the Commission results in the violation of their rights to Due Process of Law under the Constitution. The ANPA contends that the order of the Commission is invalid because it is so broad that its application would violate the terms of the Ordinance itself.

The City of Pittsburgh ("City") in its brief contends that it is not necessary to prove a single specific act of unlawful employment practice to sustain the decision under the law. The City contends that in the absence or reliance by the Press upon exemptions or exceptions provided by the Ordinance, and in view of the clear policies of the law against discrimination, the Commission did properly determine that the classification system itself is unlawful under Section 8 (j). [17]

To sustain the theory of the determination by the Commission the City cites cases dealing with unlawful racial discrimination *Brown v. Board of Education,* 347, U.S. 483, S. Ct. 683 (1954) and *Pennsylvania Human Relations Commission v. Chester School District,* 427 Pa. 157 223 A. 2d 290 (1967).

The City also urges that because of the nature of the crime of discrimination and because of the difficulty of proof thereof, the conclusion that the system itself is unlawful is justified. The difficulty of proof of any discrimination is well known: *Holland v. Edwards,* 119 N. E. 2d 581, (N. Y. 1954): *Woolworth Co. v. NLRB,* 121 F. 2d 658, 660 (CCA 2d 1941).

It has been determined that the unlawful practice is the general *designation of sex* in the caption. Sex classification is as unlawful as general captions of "Black", "White", "Catholic", "Presbyterian", "Italian", "Polish" or "German" would be unlawful. This court will not re-

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17. It is not argued that the case of the female who testified that she applied for and was refused employment as a dishwasher in response to an ad under the male interest classification established unlawful discrimination.

verse the determination that sex is an unlawful general designation just as any other comparable designation which uses sex, race, religion, or national origin would be contrary to law. The Commission found that males are given preference in one segregated column and females are given preference in another column without any relation to exceptions or exemptions permitted by the local and state legislation. Inherent in the adjudication of the Commission is the determination that with the aid or participation of the Press, employers, or employment agencies are permitted to easily defeat the clear policy of the law.

There is substantial evidence that a general male and female classification is harmful without proof of a specific violation. The general classification on the supposed basis of reader preference does offer to others the opportunity to evade responsibility for unlawful discrimination. The evidence indicated that reader preference is, in reality, employer preference and this presents a screen not easily pierced to determine actual employer discrimination. The Press is not responsible for possible employment discrimination. The vehicle by which the law may be defeated by an employer through use of general sex captions is the responsibility of the publisher and is found to be bad.

Reference to sex in the body of an ad is not automatically preclude by the adjudication of the Commission.[18] Any reference to sex in the advertisement may

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18. There is reference in footnote 2 of the adjudication by the Commission to a meeting and a policy of the Press concerning content which is not before the court.

well place the responsibility for discrimination with the advertiser where it belongs.

The language of both state and local law indicates that the legislative intent was to afford sex the same protection as race, religion and other designations. It is not within the power of this court to legislate a different result in one category than in another. If the legislators do not intend sex to be treated as race and religion as a basis for discrimination, the clear language of the law should be changed.

The ANPA contends that the order is so broad that it would violate the terms of the Ordinance which recognizes exceptions or exemptions. It is argued that the captions designating male and female are necessary so that when sex is a legitimate bona fide occupational qualification persons may advertise and so that persons not covered by the Ordinance may advertise in such columns.

The qualifications, exemptions and exclusions of the Ordinance which permit certain discrimination are just as applicable to race, color, creed, ancestry and other categories as they are applicable to the category of sex. It is not suggested that captions bearing racial or other references should be necessary to the operation of a newspaper. Likewise, it is not contended that racial or religious captions are necessary to permit those employers to advertise who may properly take advantage of legal exceptions or evemptions and who may discriminate on such grounds with immunity.

II

The evidence fails to establish any relationship between the general male and female captions of adver-

tisements used by the Press and bona fide occupational qualifications or any other exceptions or exemptions to the legislation which would permit such a difference in treatment based upon sex.

The language of the Order of the Commission is extremely broad. We interpret the Order to preclude the general captions presently in use without regard to exception or excemption. We do not pass upon possible general captions which may be permissible because of legitimate exceptions to the Ordinance.[18a] By the same reasoning, this court does not interpret the present ruling of the Commission to require the Press or any other publisher to censor the content of an advertisement. The matter of *content of an advertisement* which makes reference to sex, race or religion is *not* before the court.[19]

The ANPA contends that the Commission Order is too broad because it makes no provisions for employers who are outside the geographical confines of the City of Pittsburgh and who utilize the classified advertisement columns of the newspaper. The publication by the Press within the geographical limits of the city subjects the Press to the jurisdiction of the Commission.[20]

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18a. Likewise, failure to define exceptions or exemptions which may properly be granted under Section 8 of the Ordinance was not before the Commission and is not before this court.

19. It has been noted that the only reference to content of advertisements in the adjudication by the Commission is contained in one footnote. There is nothing in the Order of the Commission pertaining to the content of advertisements.

20. The language of the Pennsylvania Human Relations Act, supra, is similar to that of the Ordinance. If the Pennsylvania Human Relations Commission en-

In *Hill v. Fetherolf*, 236 Pa. 70, 78 (1912) the Pennsylvania, Supreme Court upheld the right of the City to require the inspection of the farms of out-of-city milk producers when the milk was offered for sale in the City.

An out-of-city employer is not subject to the Ordinance at the site of his business. However, if an employer or any one else elects to recruit employees through publication within the territorial boundaries of the City, he must comply with the Ordinance.

A labor union or employment agency, located within the City of Pittsburgh is subject to the Ordinance when recruitment is done within the confines of the City. Any unlawful discrimination is such recruitment would be subject to the Ordinance even if the prospective employment is elsewhere.

It is contended that the complaint is so vague as to violate rights under Federal and State Constitutions. It is argued that the charges could not be defended because of lack of notice. It is also argued that the Press could not be found guilty of violation of Section 8 (j) because it was charged with aiding persons un-named.

III

It is contended by the ANPA that because Section 8 (j) forbids persons from aiding and abetting the violation of the Ordinance, it is elementary that the com-

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tered an appropriate order for newspapers outside of the City of Pittsburgh after proceedings under the statute it would be for the court to determine the validity of that Order. Hopefully, any decision based upon the same facts and statutory language would be consistent with this opinion.

plaint must set forth the act and the persons who were aided and abetted by respondent.

These matters were all raised by the Press before the Commission. Each is discussed in the adjudication by the Commission.

After filing the complaint the Commission held a pre-hearing conference and, at the request of the Press, the public hearing was delayed until January 15, 1970. The Commission also granted a two-week recess after close of complaints case to afford additional time for the Press to prepare its defense. The adjudication of the Commission determines the Press to be in violation of Section 8 (j) of the Ordinance as charged.

From the language of the complaint, from the pre-hearing proceedings, and from Section 8 of the Ordinance itself certain things should have been obvious to the Press. The Press had notice that it was accused under Section 8 (j) to the Ordinance of *participation in the publication of advertisements* contrary to law. It should also have been obvious that the above quoted language puts in issue the policy of allowing employers to place advertisements in the general male and female columns "obviously", without regard to the Ordinance.

The language of the Ordinance, supra, when read with the quoted language of the complaint afforded adequate notice. The contention that the charges were vague is without merit in these circumstances.

This is an appeal from an administrative proceeding. The issue of the alleged failure to state a cause of action is governed by what has already been discussed in this opinion. In administrative proceedings:

"The pleading may be informal, and the sufficiency of the statements therein is not to be measured by the requirements of the Complaint or initial pleading in a court proceeding, whether civil or criminal". *Am. Jur.* 2d., Administrative Law, Section 371.

The section under which the Press was accused makes it a violation of the Ordinance to aid or participate in the permitting of others to place advertisements in general male and female columns with obvious disregard to the law.

The complaint of NOW sets forth:

"The National Organization for Women charges the Pittsburgh Press with deliberate and constant violations of Section 8 (j) of the Human Relations Ordinance, as amended by Ordinance 395. The National Organization for Women has attempted on several occasions to convince editors and publishers of the Pittsburgh Press that their policy of allowing employers to place advertisements in the male or female columns, when the jobs advertised obviously do not have bona fide occupational qualifications or exceptions, is unlawful."

The defense was based upon the theory that the Press had a right to rely upon preference of readers. It has been noted that from the evidence the Commission could have determined that the reader preference was in reality advertiser preference. Even if the Press did demonstrate that its policy is preferred by the reader, such preference must way to the clear language of the legislation which precludes unequal treatment solely on the basis of sex. The overriding determination by the

Commission is that the policy of the Press is bad even though it is firmly entreached in tradition.

IV

If the readers of even the court prefers discriminatory treatment on the basis of sex, this is of no consequence while the legislation reads as it does.

This court will not reverse the Commission. There was sufficient evidence from which the Commission could determine that the policy of the Press is obviously in total disregard to the provisions of the law. In these circumstances it was not necessary that the wrongful act of a named advertiser be shown.

In its adjudication the Commission sets forth that two employers have applied for exemption in the eighteen years that the Ordinance has been in effect. No requests for exemption to the Ordinance have been made since sex was added as a category. In view of what has already discussed and because of the circumstances this court determines that the conclusions of law made by the Commission are proper.

The decisions in criminal cases cited in support of appellant's arguments are not controlling in this matter. This court does not believe that a "participant" can be equated with an "accomplice" as that word is used in our criminal decisions.

The appellant complains that the Order of the Commission is invalid by operation of the Fifth Amendment to the Federal Constitution which prohibits laws abridging the freedom of the press. The ANPA contends that this constitutional right is violated because the action of

the Commission requires the Press to act as a censor or enforcement agency with its advertisers.

It is conceded that there may be valid legislation to regulate the commercial aspects of a newspaper. *Newspaper Advertising Act of May 16, 1909,* P.L. 1784, 45 P.S. 1; *Sharon Herold v. Mercer County,* 132 Pa. Super. Ct. 245 (1938). It is difficult to think of a more commercial aspect of the newspaper than captions to the classified advertisement section.

Certainly the Commission is attempting to regulate particular aspect of the newspaper in that classified advertisements may not have captions found to be discriminatory. The regulation of captions to columns which is imposed by the Commission is pursuant to the clear policy of the law which prohibits certain discrimination. This policy against discrimination is clearly established in the ordinance as well as in State and Federal legislation to which reference has already been made. Any restriction on freedom of expression may be no greater than necessary to prevent the harm resulting in the absence of such regulation. What is prohibited is simply the general sexual classification of advertisements. No advertisement is prohibited. No expression of opinions by the Press is prohibited.

The Order of the Commission in no way interferes with the editorial or news content of the newspaper. The Press may continue to express its editorial views with freedom. It may editorialize on this elimination of sex-segregated column headings or any other position related to the status of women supported by the publisher and editor. It may report the news on the subject as it sees fit.

This court does not consider the restriction imposed on the Press as violative of its rights under the First Amendment to the Federal Constitution in the circumstances here present.

It has already been noted that the Commission may not require the Press to censor the content of its classified advertisements. It has also been noted that the Order of the Commission is a broad one. The Press has a legitimate cause for alarm if the action is an attempt on the part of the Commission to impose duties of censorship or enforcement.

The action of the Commission is justified solely on the basis that the general captions referring to male and female are found to be offensive and that these captions result from the policy of the Press. The elimination of the captions should not be used in an attempt to impose duties on the Press. Any advice given by the Press to its advertisers concerning the possible violation of laws on discrimination by the *content* of the ad is given as a service by the Press. We do not interpret the actions of the Commission to impose any additional duty on the Press.

Any refusal by the Press to accept certain advertisements because of their content would be based upon a policy of the Press or upon some other ruling by the Commission and not by virtue of the action of the Commission now before the court. If the content of an advertisement is unlawful it is for the Commission to prosecute the prospective employer if there is a violation of the law. In order for the Press to be guilty of violation of the Ordinance under Section 8 (j) when the *content* of a specified advertisement is at issue something more must be involved than what is now before the court for determination.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

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| APPEAL OF THE PITTSBURGH PRESS COMPANY FROM THE ORDER OF THE PITTSBURGH COMMISSION ON HUMAN RELATIONS AT FEP CASE NO. 558 | No. S.A. 768 of 1970. |

**Order**

MARTIN, J.

Now, this 24th day of March, 1971, the transcript of testimony before the Human Relations Commission of the City of Pittsburgh is directed to be filed with the Prothonotary. In accordance with the foregoing opinion, the findings of fact and conclusions of law made by the Human Relations Commission of the City of Pittsburgh are proper and the order of the Human Relations Commission is hereby affirmed. The Pittsburgh Press Company is directed to comply with the order dated July 23, 1970, within thirty (30) days from the date hereof.

BY THE COURT
E. J. MARTIN, J.

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

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| PITTSBURGH PRESS COMPANY,<br>Appellant<br>v.<br>THE NATIONAL COMMISSION ON HUMAN RELATIONS, and CITY OF PITTSBURGH,<br>Appellee<br>and<br>THE NATIONAL ORGANIZATION FOR WOMEN, INC.,<br>Intervenor-Appellee<br>and<br>THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,<br>Amicus Curiae | No. 315 C. D. 1971 |

Before:

HONORABLE JAMES S. BOWMAN, President Judge
HONORABLE JAMES C. CRUMLISH, JR., Judge
HONORABLE HARRY A. KRAMER, Judge
HONORABLE ROY WILKINSON, JR., Judge
HONORABLE LOUIS L. MANDERINO, Judge
HONORABLE GLENN E. MENCER, Judge
HONORABLE THEODORE O. ROGERS, Judge

Argued: October 20, 1971

Judge Manderino did not participate in the decision of this case.

## Opinion

OPINION BY JUDGE KRAMER January 27, 1972

This is an appeal from an Order of the Court of Common Pleas of Allegheny County dated March 24, 1971, affirming an Order of the Pittsburgh Commission on Human Relations (Commission), appellee, dated July 23, 1970. This Order found the Pittsburgh Press Company (Pittsburgh Press), appellant, to be in violation of the Human Relations Ordinance of the City of Pittsburgh and ordered the utilization of a "classification system of employment advertisement with no reference to sex."

This case was commenced on October 9, 1969, when the National Organization for Women (N.O.W.) filed a complaint with the Commission charging the Pittsburgh Press with "deliberate and constant violations" of Section 8(j) of Ordinance No. 75, enacted into law by the Council of the City of Pittsburgh on February 27, 1967, and as amended by Ordinance No. 395*, approved July 8, 1969. After a conference with the parties, the Commission, on November 3, 1969, found that "probable cause" existed to support the filing of the complaint, and a public hearing was directed to be held. On January 6, 1970, the Pittsburgh Press filed its answer to the complaint, and hearings were held before the Commission on four days during January and February 1970.

The Human Relations Ordinance has been upheld as a valid enactment of the City of Pittsburgh within the authority confered upon the City by the Act of

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*"This amendment added the word "sex" to the list of protected classes.

March 7, 1901, P.L. 20, Article XIX, Section 3, Clause XLIII, 53 P.S. 23158. *See City of Pittsburgh v. Plumbers' Local Union No. 27,* 113 PLJ 7, (1965); *Stanton Land Company et al. v. City of Pittsburgh,* 111 PLJ 9 (1963). Also *see* Act of October 27, 1955, P.L. 744, Section 12.1, as amended, 43 P.S. §961.1.

The "particular" of the complaint of N.O.W. reads as follows:

> "The National Organization for Women charges the Pittsburgh Press with deliberate and constant violations of section 8 (j) of the Human Relations Ordinance as amended by Ordinance 395. The National Organization for Women has attempted on several occasions to convince editors and publishers of the Pittsburgh Press that their policy of allowing employers to place advertisements in male or female columns, when the jobs advertised obviously do not have bona fide occupational qualifications or exceptions, is unlawful."

The pertinent provisions of Section 8(j) of the amended ordinance read as follows:

> "It shall be an unlawful practice . . . except where based upon a bona fide occupational exemption certified by the Commission in accordance with Section 7, subsection (d) of this ordinance: . . .
>
> "(j) for any person, whether or not an employer, employment agency or labor organization, *to aid,* incite, compel, coerce or participate in the doing of any act declared to be an unlawful employment practice by this ordinance, or to obstruct or prevent any person from enforcing or complying with the provisions of this ordinance, or any rule, regu-

lation or order of the Commission, or to attempt directly or indirectly to commit any act declared by this ordinance to be an unlawful employment practice." (Emphasis added)

Section 8 (e) of the amended ordinance declares it to be an unlawful employment practice:

"(e) for any employer, employment agency, or labor organization to publish or circulate, or to cause to be published or circulated, any notice or advertisement relating to employment or membership which indicates any discrimination because of race, color, religion, ancestry, national origin or place of birth, or sex."

Section 7 (d), mentioned in Section 8 (j) above, reads:

"The Commission shall have the power and it shall be its duty to:

"(d) Certify upon the request of any person that a particular occupation or position is exempt from the provisions of this ordinance relating to unlawful employment practices if the Commission finds that the occupation or position reasonably requires the employment of a person or persons of a particular race, color, religion, ancestry, national origin or place of birth, or sex and that such certification is not sought as means of circumventing the spirit and purpose of this ordinance, the burden of proving the facts required for such a finding to be in each instance upon the person requesting the certification of exemption from the provisions of this ordinance."

We should also point out that under definitions in Section 4 of the Ordinance, we find:

> "(b) Discriminate and discrimination — The terms 'discriminate' and 'discrimination' include any difference in treatment based on race, color, religion, ancestry, national origin, place of birth, or sex."

The record in this case clearly shows that the Pittsburgh Press has attempted to eliminate discriminatory employment advertising on the basis of sex and thereby achieve the goals of the Ordinance. Illustrative of this attempt are references in the record to changes already made in its advertising column headings and efforts to eliminate the terms "male" and "female" in the body of employment advertising ads. These changes were effected through negotiation and conference with the Commission. The record indicates an intent and desire on the part of the Pittsburgh Press to cooperate with the Commission in eliminating discriminatory wording in employment advertising. This certainly is commendable and to be expected of the Pittsburgh Press in light of its role as one of the nation's leading civil rights advocates in both word and deed.

The complaint of N.O.W., and this opinion, are restricted to alleged discrimination found in employment advertising column headings. The specific wording of the employment advertising column headings which are at issue in this case are three, namely, "Jobs — Female Interest", "Jobs — Male Interest" and "Male — Female Help".

In view of the fact that the court below did not take any additional testimony or receive any additional evidence, the scope of review of this Court is to deter-

mine whether or not the Commission abused its discretion or committed an error of law. *Gabriele v. Boeing Co., Vertol Division,* 1 Pa. Commonwealth Ct. 96, 99, 272 A. 2d 527, 529 (1971), *Romain v. Middletown Area School District,* 1 Pa. Commonwealth Ct. 419, 421, 275 A. 2d 400 (1971).

It should be pointed out that the record also indicates that the Pittsburgh Press publishes, what was termed in the record as, a "disclaimer" at the beginning of the male and female interest want ads, which reads as follows:

> "Notice to job seekers. Jobs are arranged under male and female classifications for the convenience of our readers. This is done because most jobs generally appeal more to persons of one sex than the other. Various laws and ordinances—local, state, and federal, prohibit discrimination in employment because of sex, unless sex is a bona fide occupational requirement. Unless the advertisement itself specifies one sex or the other, job seekers should assume that the advertiser will consider applicants of either sex in compliance with the laws against discrimination."

In its "Decision and Order" the Commission made ten findings of fact which, upon our review of the record, are supported by substantial evidence. The Commission and the court below concluded that in its employment advertising the Pittsburgh Press was aiding employers in discriminating against women through the use of the above-noted column headings, and therefore was engaged in an unlawful employment practice violative of Section 8(j) of the Ordinance.

The lower court, in a lengthy opinion, affirmed the findings of fact and conclusions of law made by the Commission and directed the Pittsburgh Press to comply with the Commission order on or before May 10, 1971. An appeal was taken to this Court, and we granted the prayer of a petition for a supersedeas, pendente lite. The court below was aided by the participation of a number of amici curiae who filed briefs, two of whom were permitted by this Court to intervene. Briefs were submitted by the Solicitor of the City of Pittsburgh, on behalf of N.O.W. in support of the Commission's Order, and by the American Newspaper Publishers Association (ANPA) in support of the position of the Pittsburgh Press.

The Pittsburgh Press in its brief raises three issues which we will cover in the following sequence. First, the Pittsburgh Press states that the Commission violated its constitutional rights to due process of law by issuing an adverse order based upon a record devoid of any identified, alleged or proven principal offense. Secondly, the Pittsburgh Press argues that its use of the employment advertisement column headings in question does not constitute discrimination as prohibited by the Ordinance. Lastly, the Pittsburgh Press argues that the scope of the order of the Commission as affirmed by the court below exceeds the scope of the Commission's authority and jurisdiction and that it is too broad in proscribing all reference to male and female, in that the Ordinance itself allows certain exemptions.

### Due Process

The Pittsburgh Press argues that failure on the part of N.O.W. to specifically allege, prove or identify the principal offense of discrimination renders the Com-

mission's Order invalid in that due process of law was not afforded to the Pittsburgh Press.

The Pittsburgh Press is correct in its assertion that due process of law is as equally applicable to administrative proceedings as it is to judicial proceedings. In *W. J. Dillner Transfer Co. v. Pennsylvania P.U.C.* at 175 Pa. Superior Ct., 461, 468-69, 107 A. 2d 159 (1954) our Superior Court said:

> "Appellant argues it was not sufficiently appraised of the issue in that the complaint set forth and charged a violation of appellant's authority at Folder 3 of A. 61744, whereas the Commission based its finding on violation particularly on an interpretation of authority granted at Folder 2 of A. 61744. Admittedly the requirement of procedural due process applies to proceedings before administrative tribunals as well as judicial bodies. The question of what constitutes a specific designation of the issue raised or charges made depends upon the violation alleged and the type of investigation being conducted. *Armour Transportation Company v. Pennsylvania P.U.C.*, 138 Pa. Super. 243, 10 A. 2d 86; . . ."

In the *Armour* case, *supra* the court at 249 cited its earlier opinion in *National Automobile Corp. v. Barfod*, 289 Pa. 307, 311 137 A. 601, 602 (1927):

> "The requirement of due process of law, however, applies to administrative as well as to judicial proceedings. The doctrine of notice and hearing thus becomes a more potent force in our land, because it applies to the decisions and acts of administrative officials and, unless there are extraordinary emer-

gencies, this essential requisite of due process cannot be dispensed with."

The *Armour* court also said at 250-51:

"There must be due notice and an opportunity to be heard, the procedure must be consistent with the essentials of a fair trial, and the commission must act upon evidence and not arbitrarily. . . . *Railroad Commission v. Pacific Gas & Electric Co.*, 302 U.S. 388, 393, 82 L. ed. 319. The question of what is proper notice, or, as here, of what constitutes a specific designation of the issue raised or charges made, depends necessarily upon the facts of each case, the type of investigation being conducted, the violations alleged, and the penalty or order sought to be imposed. Where the purpose of the investigation by the Commission is only to determine the reasonableness of rates charged by utility, a different standard would seem to apply than where the franchise of the utility is sought to be revoked for violation of the utility laws and a penalty or fine imposed."

The ingredients of due process have been discussed in a multitude of judicial opinions. A reading of many of these cases confirms our understanding that due process of law is afforded when (1) the "accused" is informed with reasonable certainty of the nature of the accusation lodged against him, (2) he has timely notice and opportunity to answer these charges and to defend against attempted proof of such accusation, and (3) the proceedings are conducted in a fair and impartial manner. The Pittsburgh Press does not contend that it was denied an opportunity to defend itself or that it

was denied an impartial and fair hearing. The Pittsburgh Press does insist, however, that it was denied due process of law insofar as being unable to determine from the complaint the nature of the alleged offense. In *Commonwealth v. Acquaviva*, et al., 187 Pa. Superior Ct. 550, 145 A. 2d 407, 410 (1958) the Superior Court adopted the lower court opinion of Judge Laub in which he stated:

> "It is sufficient if the language used is capable of an interpretation which reveals such essentials. Lack of precision is not itself offensive to the requirement of due process. The constitution does not require impossible standards; all that is required is that the language convey sufficient definite warning as to the prescribed conduct when measured by common understanding and practices. *Roth v. United States*, 354 U. S. 476, 77 Supreme Court 1304, 1 L. E. 2d 1498."

Although this was a criminal case, the principle is applicable here.

This is an administrative proceeding and is not restricted by the niceties of common law pleadings. The Pennsylvania Legislature in its wisdom permitted the establishment of local administrative agencies to process complaints and hold proceedings to adjudicate issues concerning certain rights of citizens. It certainly was within the contemplation of the Legislature that such a local administrative agency would be lay-oriented. It was contemplated, and is indeed the reality, that persons not formally trained in the law often serve as human relations commissioners. Similarly, it was to be expected that the complaints and charges would be framed

in the language of laymen. Administrative agency proceedings have never been held to the high standards of the law suit filed in a court of law. In *Kochinsky v. Independent Pier Company,* at 157 Pa. Superior Ct. 15, 41 A. 2d 409, 410-11 (1945), the court said:

> "Proceedings before the compensation authorities are not 'litigation', and the strict rules of pleading and practice applicable to common law actions do not apply. The courts take a liberal attitude toward the pleadings in compensation cases and consider the substance of the relief prayed for rather than its form. . . . Of course, the parties are entitled to know the issue in any particular proceeding so that they may be prepared to meet it by proper evidence.

A determination by this Court that the Pittsburgh Press had sufficient knowledge of the charges against it, thus enabling it to properly defend, would be dispositive of the due process of law question in the instant case. We are in agreement with the Pittsburgh Press argument that the "particulars" (required by the Ordinance) as set forth in the original complaint of N.O.W. lacked some specificity. Nevertheless, we hold that the complaint particulars were adequate and sufficiently specific under the test of fairness. We hold that the Pittsburgh Press was properly and adequately informed of the charged violation of Subsection 8(j) of the Pittsburgh Human Relations Ordinance, as amended. The appellant newspaper had notice and knowledge of the charge that it was aiding employers to unlawfully discriminate by the placing of employment advertisements under the arbitrarily segregated male and female columns on the advertising pages of the newspaper.

The Pittsburgh Press was afforded all of the protection required in the proceedings before the Commission, and therefore we hold that the Pittsburgh Press was not denied its constitutional right to due process of law.

Counsel for the Pittsburgh Press further argues that an additional deficiency in the complaint was the lack of any specific incident wherein column segregated employment advertisements resulted in sex discrimination to a particular woman.

The nature of the charge herein filed is discrimination against a class (women). It is well established that when the Legislature proscribes discriminatory acts against a class it is unnecessary for the complaining class representative to allege specific injured parties. *See Pa. Human Relations Commission v. Chester School District,* 427 Pa. 157, 233 A. 2d 290 (1967). If the advertising column headings here are discriminatory, they are in violation of the Ordinance per se, and there need not be a specific "particular" on an actual discrimination suffered by any particular woman. If discriminatory, the column headings were in violation before the first woman actually suffered any act of discrimination.*

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*We note with interest the language of the Pa. Human Relations Commission, Guidelines On Discrimination Because of Sex, Pa. Bulletin No. 24, Vol. 1, p. 707, Dec. 19, 1970, "The placement of an advertisement seeking applicants for employment in a classified advertisement section under 'Help Wanted - Male,' or 'Help Wanted - Female Interest' or similar columns with a sex designation is considered to be a violation of §5(b)(2) [Pa. Human Relations Act, Act of July 9, 1969, P.L. 133, 46 P.S. 955] if an employer is covered by the Act and has not received a bona fide occupational qualification exemption from the Commission."

We note here that contrary to the argument of the Pittsburgh Press that the record does not disclose any specific incident of discrimination against any specific woman, a careful reading of the record indicates that one witness did in fact testify to such a result. Her testimony indicated that she responded to an ad placed in the "Jobs - Male Interest" column for a "dishwasher" and was advised by an agent of the employer that he had been given specific instructions not to hire a female for the advertised job. The interesting point is that counsel for the Pittsburgh Press, while arguing that this testimony was irrelevant, admitted on the record that this witness may well have had legitimate grounds upon which to file a complaint before the Commission. In view of the fact that the discriminatory practice came about as a result of an ad placed by the employer and was published in an arbitrarily segregated "male" column, we hold that there was substantial evidence placed in the record to support the charge made by N.O.W.

VIOLATION OF THE ORDINANCE

The Pittsburgh Press argues that its manner of job classification column heading arrangement was selected for the purpose of providing maximum aid to both the advertiser and the job applicant. The Pittsburgh Press insists that this manner of arranging employment advertisements is oriented to the interests of persons seeking employment. The record does not support this contention. The record clearly demonstrates that this sex segregated system of want ad column classification is geared primarily to the interests and desires of employers. The Pittsburgh Press further argues that in the event discriminatory motivations are found on the

part of a particular employer, nevertheless the Pittsburgh Press is exculpated by way of the prior cited "disclaimer".

We have long passed that point in the advancement of civil rights whereby a declaration of intent can be used as a screen or defense for actual discrimination. The "separate but equal" principle is no longer a legitimate argument in civil rights cases. We agree with counsel for the Pittsburgh Press when he states, "The purpose of the statute was to prohibit practices which denied job opportunities to individuals because of sex." The Pittsburgh Press cannot frustrate that purpose by a declaration that column headings are arranged for a reader's convenience and that any recourse to be had by women lies against those employers who do in fact discriminate.

The right to work and its concommitant opportunity to achieve economic security and stability are essential to the pursuit of life, liberty and happiness. As early as 1915, the United States Supreme Court declared that:

> ". . . the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment [Fourteenth] to secure. *Truax v. Raich,* 239 U.S. 33, 41, 60 L. ed. 131, 135 (1915)."

To anyone who even once has viewed women participating in a roller derby, the argument that all women are the weaker sex, desirous of only the more genteel work, carries little weight. The success of women jockeys is further evidence of which we can take notice. It is no longer possible to state that all women desire, or have

an "interest" in, any one type or classification of work. Some women have the desire, ability and stamina to do any work that men can do. Once we accept such a premise it then becomes logically impossible to permit continued segregation of employment want ads by column headings for any job coming within the purview of the Ordinance.

The law recognizes few absolutes and the necessity to recognize the legitimate exceptions continues. As a society we continue to recognize the existence of certain differences between men and women and consequently, exceptions permitted under Section 8 of the Ordinance, *supra,* by certification of the Commission are a legitimate and proper method to differentiate, provided that such grants are both reasonable and legal. Any employer having a legitimate need to so advertise may apply for the legislatively recognized exemption. Interestingly, both the Pittsburgh Press and the ANPA agree that in the absence of an exemption, the Pittsburgh Press could not utilize column headings such as "Jobs - Black Interest" or "Jobs - White Interest" or "Jobs - Catholic Interest" or "Jobs - German Interest", etc.

The appellants argue that the discrimination cases are analogous to the "false advertising" cases, wherein the courts have held that a newspaper cannot be held liable for the false advertising of an advertiser. We feel compelled to reject the analogy for the reason that the maintenance of segregated column headings in and of themselves is indicative of a newspaper's participation in an illegal discriminatory scheme. On the other hand, the simple publication of a particular advertisement

later found to be false, without proof of complicity, actual or constructive, casts no shadows of liability onto a newspaper.

This is not a matter of whether the Pittsburgh Press intentionally conspired with some employer or employers to discriminate against women. What is of importance is that through the use of its arbitrarily selected column headings the Pittsburgh Press "aids" such employers to discriminate. When the Pittsburgh Press arbitrarily arranges and publishes such column headings it is aiding in sex discrimination. The ruling that employment want ad column headings be written asexually is appropriate because it eliminates the difficulties of evaluating sophisticated medical, sociological, and actuarial theories of aggregate differences between the sexes. It is proper because it represents the highest degree of societal commitment to the ideal of legal sexual equality. Perhaps more importantly, asexual employment advertising column headings will aid in guaranteeing women their fundamental right to be hired and judged on the basis of individual characteristics and capabilities.

The Pittsburgh Press and ANPA argue that a distinction exists between sex and other protected classes. To the contrary, we hold that acts of discrimination prohibited by this Ordinance apply *equally* to "any difference in treatment based on race, color, religion, ancestry, national origin, place of birth, or sex".

There is not one word to be found in the Ordinance which could support appellants' argument that discrimination on the basis of sex is to be treated any differently than discrimination in any of the other categories. Sex,

like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth. What differentiates sex from the so-called "nonsuspect statutes", such as intelligence or physical disability, and aligns it with the recognized "suspect" classification (race) is that the characteristic usually bears no relation to ability to perform or contribute to society. The result is that the entire class is abrogated to an inferior legal status without regard to the capabilities or characteristics of its individual members. Women, like blacks, have historically labored under legal and social disabilities. Like black citizens, for many years they were denied the right to vote and until recently were unable to serve on juries in many states. Married women in this state were placed in a different position vis-a-vis their property rights. None of these distinctions was based upon legitimate differences. The pedastal upon which history and the law have placed women has evolved into an isolation booth, far removed from the rights afforded the rest of society.

In *Sail'er Inn, Inc., et al. v. Kirby,* 95 Cal. Rptr 329, 334, 485, P. 2d 529, 534 (1971), the California Supreme Court refused to uphold legislation designed to protect women in not permitting them to work behind a liquor bar. The Court said:

> "But even if we assume that bartending is more dangerous than waiting on tables, there is no evidence that women bartenders are more likely than male bartenders to suffer injury at the hands of customers. A desire to protect women from the general hazards inherent in many occupations cannot be a valid ground for excluding them from those occupations under Section 18. Women must

be permitted to take their chances along with men when they are otherwise qualified and capable of meeting the requirements of their employment."

In *Weeks v. Southern Bell T. & T. Co.*, 408 F. 2d 228, 236 (1969), the Court stated:

"What does seem clear is that using these class stereotypes denies desirable positions to a great many women perfectly capable of performing the duties involved . . . Moreover, Title VII* rejects just this type of romantic paternalism as unduly Victorian, and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing. We cannot conclude that by including the bona fide occupational qualification exception Congress intended to renege on that promise. . . . The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group. (And at page 235) We conclude that the principle of non-discrimination requires that we hold that in order to rely on the bona fide occupational qualification exception, an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that

*"Title VII" refers to the Civil Rights Act of 1964, 42 U.S.C. 2000 (e).

all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.

This quotation captures the essence and purpose of this Pittsburgh Ordinance.

The state of a human being without a job is a neutral fact, equally applicable to both sexes. The finding of a job should also be a neutral fact, equally accessable to both sexes.

In *Richards v. Griffith Rubber Mills,* 300 F. Supp. 338, 340, (D. C. Or. 1969), the United States District Court held that refusal to hire a qualified woman job applicant could no longer be supported by reliance on a state law and ruled as follows:

". . . Except in rare and justifiable circumstances . . . the law no longer permits either employers or the states to deal with women as a class in relation to employment to their disadvantage. . . . Individuals must be judged as individuals and not on the basis of characteristics generally attributed to racial, religious or sexual groups."

In the case of *Reed v. Reed,* not as yet reported, but handed down by the United States Supreme Court on November 22, 1971, 40 LW 4013, where the Court held unconstitutional those portions of an Idaho statute giving preference to males in the granting of letters of administration in estates, the Court said:

"So long as the law deals only with a characteristic found in all (or some) women but no men, or in all (or some) men but not in women, it does not ignore individual characteristics found in both

sexes in favor of an average based upon one sex. . . . Differences should not be based upon the qualities of male or female but upon the characteristics and abilities of the individual."

We are guided by such pronouncements.

Finally, under this section, ANPA also raises the specter of an alleged violation of the newspaper's constitutional right to "freedom of the press". We hold this argument to be non-meritorious. A restriction on discriminatory column headings in employment want ads does not interfere with the editorial policy of the newspaper. There is precedent for the principle that advertising, per se, does not come within the purview of this constitutional right. In the case of *Lorain Journal Company v. U.S.*, 342 U.S. 143, 96 L. ed. 162 (1951), the United States Supreme Court held that an injunction restraining a publisher under the Sherman Antitrust Act from refusing to accept local advertising from customers using a competitive radio station for the same purpose did not violate the constitutional right of freedom of the press as a prior restraint upon what the newspaper could publish.

In the case of *Kovacs v. Cooper*, 336 U.S. 77, 93 L. ed. 513 (1949), the Court upheld a city ordinance prohibiting sound amplifiers used in public streets, stating that although freedom of speech is given a "preferred position", nevertheless "to enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself." As was pointed out by the United States Supreme Court in the case of *Mutual Film Corp. v. Industrial Commission*, 236 U.S. 230, 59 L. ed. 552, 559 (1915), the underlying safeguard of the constitutional

provision for freedom of the press is "that opinion is free and that conduct alone is amenable to the law".

Whether the Pittsburgh Press has a constitutional right to print editorials, or news columns, or byline stories for or against sex discrimination is not the issue before us. What is before us is the question of whether in its advertising business the use of arbitrarily sex-segregated employment want ad column headings by this newspaper "aids" an employer in sex discrimination. The Commission and the court below concluded in the affirmative. We affirm those findings and conclusions.

BROADNESS OF COMMISSION ORDER

The Pittsburgh Press properly points out that Section 4(c) of the Ordinance states:

> "Employer —Any person who employs five or more employees, exclusive of the parents, spouse or children of such person, including the City of Pittsburgh, its departments, boards, commissions, and authorities and any other governmental agency within its jurisdiction, but excluding any religious, fraternal, charitable or sectarian organization which is not supported in whole or part by any governmental appropriations."

Section 4(d) of the Ordinance states:

> "Employment — The term 'employment' shall not include the employment of individuals in domestic service."

The record clearly shows that approximately 25 per cent of the advertisers placing employment want ads in the Pittsburgh Press are based within the City of Pittsburgh. The record further indicates that the Ordinance

cannot affect out-of-city advertisers seeking employees for jobs located outside the jurisdiction of the Commission. Perhaps more importantly the Pittsburgh Press points out that in the introductory clause of Section 8 it is stated:

> "It shall be an unlawful employment practice, except where based upon applicable national security regulations established by the United States, by the Commonwealth of Pennsylvania, or by any political subdivision of the Commonwealth having jurisdiction in the City of Pittsburgh, or *except where based upon a bona fide occupational exception certified by the commission* in accordance with Section 7, Subsection (d) of this ordinance: . . ." (Emphasis added)

It is clear then that the Ordinance itself sets forth a number of exemptions whereby it would be legally permissible to discriminate. We are not called upon to pass on the morality or social wisdom of such exemptions; and certainly it is not within the scope of review of this Court to review the philosophical beliefs or the wisdom of the legislative body which created this Ordinance. The question presented to us is whether the order of the Commission was too broad.

For the purpose of clarification on this point, we set forth the order of the Commission which reads as follows:

> "AND NOW, to wit, this 23rd day of July, 1970, in accordance with the foregoing discussion, findings of fact, and conclusions of law, it is ordered, adjudged, and decreed that:

"1. The Pittsburgh Press shall, within thirty (30) days from the date of this order, cease and desist from violating Section 8(j) of Ordinance No. 75 of 1967, as amended, and that

"2. The Pittsburgh Press shall, within thirty (30) days from the date of this order, utilize the classification system of employment advertisement with no reference to sex."

The lower court affirmed this order except as to the extension of time. There can be no question that the order of the Commission restricts the Pittsburgh Press from making *any* reference to sex in its classification system of employment advertising. We must agree with the argument that the order of the Commission is too broad.

Section 402 of the Appellate Court Jurisdiction Act, (ACJA), Act of July 30, 1970, P.L.—(Act No. 223, 1970), 17 P.S. 211.402, gives jurisdiction to this Court on appeals from the common pleas court, when the "application, interpretation or enforcement" of a local ordinance, such as here, is in question. This Court is given the power to modify the order of either the lower court or of the Commission in Section 504* of the ACJA, *supra*. We will therefore modify the above-noted order of the Commission and the order of the lower court, and direct the Court of Common Pleas to enter it in conform-

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*"Section 504. Disposition of Appeals. — An appellate court may affirm, modify, vacate, set aside or reverse any order brought before it for review, and may remand the matter an ddirect the entry of such appropriate order, or require such further proceedings to be had as may be just under the circumstances."

ity with this opinion. In all other respects we affirm the adjudication of the Commission and the order of the court below.

Based upon the above discussion, we

**Order**

AND NOW, this 27 day of January, 1972, in accordance with the adjudication of the Pittsburgh Human Relations Commission, dated July 23, 1970, and the Opinion of the Commonwealth Court of Pennsylvania filed this date, it is hereby ordered that the Pittsburgh Press Company shall within thirty (30) days from the date of this Order, cease and desist from violating Section 8(j) of the City of Pittsburgh Ordinance No. 75 of 1967, as amended, including all reference to sex in employment advertising column headings, except as may be exempt under said Ordinance, or as may be certified as exempt by said Commission. This Order shall be entered forthwith in the records of the Prothonotary of Allegheny County at No. S.A. 768 of 1970.

HARRY A. KRAMER,
Judge

CERTIFIED FROM THE RECORD

FRANCIS C. BARBUSH,
Chief Clerk

January 27, 1972.

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

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PITTSBURGH PRESS COMPANY,
Appellant

v.

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS, AND CITY OF PITTSBURGH,
Appellee

and

THE NATIONAL ORGANIZATION FOR WOMEN, INC.,
Intervenor-Appellee

and

THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,
Amicus Curiae

No. 315
C.D. 1971

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*Before*:

HONORABLE JAMES S. BOWMAN, President Judge
HONORABLE JAMES C. CRUMLISH, JR., Judge
HONORABLE HARRY A. KRAMER, Judge
HONORABLE ROY WILKINSON, JR., Judge
HONORABLE LOUIS L. MANDERINO, Judge
HONORABLE GLENN E. MENCER, Judge
HONORABLE THEODORE O. ROGERS, Judge

Argued: October 20, 1971

Judge Manderino did not participate in the decision of this case.

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**Opinion**

DISSENTING OPINION BY JUDGE CRUMLISH, JR.

Filed: January 27, 1972

I dissent. The Pittsburgh Press Company has been cited by the Pittsburgh Commission on Human Relations for aiding or participating in the unlawful employment practice of publishing advertisements which discriminate the sexes. The Commission stated in its opinion: "As a necessary step in the adjudication of this case, the Commission must determine whether the action of an employer in causing an advertisement to be placed in a sex-segregated column itself violates the ordinance." I believe that the factual findings of the Commission, as recited in either the formal findings of fact or the text of the Commission's opinion, are not sufficient to support the conclusion that advertising in gender-segregated columns establishes of itself discrimination in employment. Absent proof, Pittsburgh Press cannot be justifiably accused of aiding in an unlawful employment practice.

As the majority said, we are reviewing the findings and conclusions of the Commission and not those of the court below. *Romain v. Middletown Area School District*, 1 Pa. Commonwealth Ct. 419, 421, 275 A. 2d 400 (1971). We must therefore look to the Decision and Order of the Commission in determining whether an unlawful employment practice occurred.

Section 10(i) of the Pittsburgh Human Relations Ordinance reads in part: " . . . If upon all the evidence presented, the Commission finds that the respondent has engaged or is engaging in an unlawful practice, it

***shall state its findings of fact in writing*** and shall issue such an order in writing ***as the facts warrant*** . . . " (emphasis added). For Pittsburgh Press to be guilty of aiding and abetting an unlawful practice, section 10(1) would require factual findings by the Commission evidencing unlawful discrimination by employers. The Commission's failure to substantiate its legal conclusions is fatal to its adjudication of the publisher's guilt.

Only the following findings of fact were set forth by the Commission:

"1. The Pittsburgh Press is a newspaper of general circulation, and is engaged in business as a newspaper within the City of Pittsburgh.

"2. The National Organization for Women is an organization which has as one of its purposes combatting discrimination on the basis of sex. The Pittsburgh Chapter of the National Organization for Women has an office within the City of Pittsburgh.

"3. In 1969, the Pittsburgh Press ran a total of 248,000 help-wanted advertisements in its daily and Sunday editions.

"4. Of this advertising, 25 per cent is placed by advertisers based in the City of Pittsburgh.

"5. The Pittsburgh Press permits the advertiser to select the column within which its advertisement is to be inserted.

"6. When an advertiser does not indicate a column, the Press asks the advertiser whether it wants a male or female for the job and then inserts the advertisement in the jobs — male interest or jobs — female interest column accordingly.

"7. Prior to October of 1969, the Pittsburgh Press carried headings or captions on its relevant employment column as follows: "Male Help Wanted," "Female Help Wanted," and "Male-Female Help Wanted."

"8. From October of 1969 to the present time, the captions read: "Jobs — Male Interest," "Jobs — Female Interest," and "Male-Female."

"9. The Pittsburgh Press is an agent for the Pittsburgh Post-Gazette is the processing of employment advertisements.

"10. The Pittsburgh Press is the twelfth largest classified advertisement newspaper in the United States. The approximate circulation of the Pittsburgh Press daily is 350,000 and on Sunday 750,000."

These form the basis which purports to support the Commission's legal conclusion that "[i]t is an unlawful employment practice for an employer . . . to cause to be published an employment advertisement in a newspaper column, which column contains a caption with a designation as to sex." Clearly, the factual findings of the Commission, standing alone, do not support the conclusion reached. There is no factual showing that gender-segregated advertisements, with prominent disclaimers of discrimination, do in fact cause discrimination in employment.

The decision of the Commission allows three bases for its conclusion that gender-segregated columns are unlawful advertising by employers. First, it relies on the testimony of the Press' Classified Ad Manager who said that, in determining in which column to insert the advertisement of a prospective employer who did not proffer a column preference, he advises the employer

which of the sexes usually fills that particular position or he tries "to find out what type of person [the employer is] looking for." Although this testimony is damaging to the publisher's case, I see nothing more to this than that in an undetermined number of cases, all of which could have been exempt from or beyond the limits of the Commission's jurisdiction, employers do advertise in a particular column for the purpose of obtaining the service of a male or female. It was incumbent upon the Commission, however, to determine by evidence and factual findings, that the publisher's system was so egregious as to require the complete elimination of the practice rather than increased policing or regulation of it.

The second reason advanced by the Commission in its conclusion was "the necessary implication of the segregated columns . . . that men are given preference for jobs in one set of columns, and women are given preference for jobs in the other set . . . supported by the fact that the Pittsburgh Press runs a third section of employment advertisements, 'male-female' . . . available to men or women without discrimination." Are we to uphold the Commission's conclusion of "necessary implication" of discrimination when this conclusion is neither explained or substantiated by factual finding? Can we not say that another "necessary implication" is that an employer is seeking to reach the greatest number of qualified applicants by his action? Placing an advertisement in a gender-segregated column with this motive would not be illegal practice. Would the Commission proscribe advertising in the Jewish Exponent or Ebony Magazine because of the "necessary implication" that such advertisements do not reach non-

Jewish and non-Black potential applicants? State and municipal administrative tribunals must act upon the findings of fact as adopted by them. They may not rely upon "necessary implications" without adopting a sufficient basis in fact to support it.[1]

Finally, the Commission takes notice of certain jurisdictions which have found gender-segregated column unlawful per se. In each jurisdiction, the determination of unlawfulness was made by administrative regulation. The conclusion of per se discrimination has not heretofore been judicially tested in any of these jurisdictions. Nor has the Commission set forth or adopted the factual basis upon which these jurisdictions have reached this conclusion.

It is most unfortunate and disturbing to me to observe that in this landmark litigation, the adjudicating body has chosen to disregard the evidence presented it; that instead of seeking proof of its position, it has chosen to rely on unsubstantiated hunches and feelings. The issue raised herein deserves and requires greater in-depth consideration of the evil of gender-segregated want ads. The Commission's opinion and findings of fact

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1. We note, as the brief for the National Organization for Women suggests, that the testimony of Dr. Sandra Bem of Carnegie-Mellon University contains ample basis for finding that the full force and effect of an ad placed in the male column is to discourage women from applying. However, the Commission made no finding on the issue and did not use this testimony as support in its adjudication. We cannot guess as to the credence and credibility which the Commission ascribed to Dr. Bem's testimony. Under the mandate of section 10(1) of the City's ordinance we can only assume that the Commission disregarded this evidence.

do not substantiate their position that gender-segregated advertising is an unlawful employment practice.

Finally, it is necessary to comment upon the relationship of gender to other traits such as race, religion or ancestry. The court below stated in its opinion that "[s]ex classification is as unlawful as general captions of 'Black', 'White', 'Catholic', 'Presbyterian', 'Italian,' 'Polish,' or 'German' would be unlawful. [That] court will not reverse the determination that sex is an unlawful general designation just as any other comparable designation which uses sex, race, religion or national origin would be contrary to law." The majority adopts this position. I cannot, however, agree that classification by gender is by itself discriminatory.

To classify job interest by race or natural origin, while it may have some basis in fact, would be unlawful. The illegality of such advertising lies in the fact that the preferences expressed by such groups are the result of socio-economic factors, not inate characteristics of race or national origin. It is unlawful discrimination, without proper basis, to classify race or national origin socio-economically.

Unlike race and national origin, gender classification is based upon biological and emotional differences. The Bona Fide Occupational Qualification exemption for job related discrimination based upon gender clearly demonstrates that gender classification may have non-discriminatory bases in fact. The question of *inate* differences in job *preference,* as well as in occupational ability, is not per se unfounded. We must keep in mind that only unnatural or unjustifiable discrimination is wrongful. In my judgment, discrimina-

tion by natural classification does not violate anyone's Constitutional rights.

Because of the nature of sexual differences, as opposed to racial or ethnic differences, it was necessary for the Commission to dispell the notion that the Pittsburgh Press method of gender-segregated advertising results in gender-segregated employment practices which, even if distinguished by gender are based upon bona fide natural differences between the sexes. This classification would not be "discrimination" within the meaning of the Pittsburgh ordinance.

Despite the assertion by the lower court to the contrary, the task before the Commission was not formidable. Indeed the record before it may even contain "substantial evidence" upon which to ground its result. But the Commission must clearly adopt those findings of fact upon which it bases its conclusions of law. It must not be moved by current popular sentiment to implement its own whims, feelings, and philosophy. It must never be so zealous in the protection of the right to be free from discrimination as to act without legal basis; for when government becomes too protective, the basic freedoms we all enjoy erode, move into the legal dark ages, and we are back again to mere hope for basic freedoms.

JAMES C. CRUMLISH, JR., Judge

Judge Mencer joins in this Dissenting Opinion.

Certified from the Record.

FRANCIS C. BARBUSH.

Chief Clerk.

January 27, 1972.

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

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PITTSBURGH PRESS COMPANY,
Appelant
v.
THE PITTSBURGH COMMISSION ON HUMAN RELATIONS and CITY OF PITTSBURGH,
Appellee
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THE NATIONAL ORGANIZATION FOR WOMEN, INC.,
Intervenor-Appellee
and
THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION
Amicus Curiae

C. D. 1971
No. 315

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BEFORE:

HON. JAMES S. BOWMAN, President Judge
HON. JAMES C. CRUMLISH, JR., Judge
HON. HARRY A. KRAMER, Judge
HON. ROY WILKINSON, JR., Judge
HON. LOUIS L. MANDERINO, Judge
HON. GLENN E. MENCER, Judge
HON. THEODORE O. ROGERS, Judge

Argued: October 20, 1971

DISSENTING OPINION BY JUDGE MENCER

Filed January 27, 1972

I respectfully dissent. The complaint in this case alleged a violation by The Pittsburgh Press Company (appellant) of Section 8(j) of the City of Pittsburgh's Human Relations Ordinance. Section 8(j) makes it an unlawful employment practice "to aid, incite, compel, coerce or participate in the doing of any act declared to be an unlawful employment practice or to obstruct or prevent any person from enforcing or complying with the provisions of this ordinance, or any rule, regulation or order of the Commission, or to attempt directly or indirectly to commit any act declared by this ordinance to be unlawful employment practice".

The complaint does not allege any violation by anyone else. It is simply impossible for the appellant to be guilty of aiding another in the violation of the ordinance when no violation is even alleged and in fact no attempt was made to prove such a violation. It is fundamental that one cannot aid that which did not occur.

I must conclude that due process clearly requires that, without alleging or proving a violation of the ordinance by an employer who was aided by appellant, the complaint is invalid on its face and should be dismissed.

GLENN E. MENCER, J.

Certified From the Record
FRANCIS C. BARBUSH
Chief Clerk

January 27, 1972

*Appendix.*

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 208 ALLOCATUR DOCKET

PITTSBURGH PRESS COMPANY

v.

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS, and CITY OF PITTSBURGH and THE NATIONAL ORGANIZATION FOR WOMEN, INC., Intervenor

**Certified Copy of the Record**

CERTIFIED FROM THE RECORD

February 18, 1972, Petition of Pittsburgh Press Company for allowance of appeal from the judgment of the COMMONWEALTH Court at No. 315 C. D. 1971, filed.

February 25, 1972, Answer of City of Pittsburgh, filed.

March 2, 1972, Memorandum of American Newspaper Publishers Association, Amicus Curiae, filed.

ORDER

June 21, 1972, Petition denied. PER CURIAM

MR. JUSTICE MANDERINO would allow an appeal to consider constitutional questions raised involving freedom of the press.

July 31, 1972, Petition for Supersedeas with Consent, filed.

ORDER

AND NOW, to wit, this 31st day of July, 1972, upon petition of the Pittsburgh Press Company and the Stipulation of all counsel, the Court grants the prayer of the within petition and directs that the Petition for Certiorari to the Supreme Court of the United States to be filed by the Pittsburgh Press Company in this action shall operate as a supersedeas and stays the Order of the Commonwealth Court of Pennsylvania dated January 27, 1972, provided that a bond in the amount of $1,500.00 be continued.

This supersedeas shall remain in effect until thirty (30) days after a denial of Certiorari by the Supreme Court of the United States or until thirty (30) days after a determination adverse to the Pittsburgh Press Company is rendered by the Supreme Court in the event Certiorari is granted. This thirty (30) day period does not enlarge the thirty (30) day period set forth in the Order of the Commonwealth Court.

PER CURIAM

In Testimony Whereof, I have hereunto set my hand and the seal of said Court at Pittsburgh, Pa. this 24th day of August 1972.

SALLY M. MRVOS
Deputy Prothonotary

## Human Relations Ordinance

## ORDINANCE NO. 75

ENACTED INTO LAW BY THE COUNCIL OF THE CITY OF PITTSBURGH ON FEBRUARY 27, 1967. APPROVED BY THE MAYOR, FEBRUARY 28, 1967. RECORDED IN VOLUME 68, PAGE 511, IN THE OFFICE OF THE CITY CLERK.

## AN ORDINANCE

Prohibiting discrimination in employment, housing, public accommodations and other areas of intergroup relations in the social, cultural and economic life of the City of Pittsburgh; requiring fair employment practices, fair housing practices and fair public accommodations practices by prohibiting discrimination in employment, housing and public accommodations because of race, color, religion, ancestry, national origin or place of birth; establishing a Commission on Human Relations in the Office of the Mayor and prescribing the powers and duties thereof; providing penalties, and revising and consolidating the ordinances relating thereto.

The Council of the City of Pittsburgh hereby enacts as follows:

### SECTION 1. SHORT TITLE

This Ordinance may be cited as the Pittsburgh Human Relations Ordinance.

### SECTION 2. LEGISLATIVE FINDINGS AND DECLARATION OF POLICY

(A) Legislative Findings

(1) The population of the City of Pittsburgh consists of people of every race, color, religion, ancestry, national origin and place of birth, many of whom by rea-

son of their race, color, religion, ancestry, national origin or place of birth are discriminated against in employment opportunities, places of public accommodation, resort, recreation and amusement, and housing facilities.

(2) Discrimination because of race, color, religion, ancestry, national origin or place of birth is contrary to the constitutions, laws and policies of the Commonwealth of Pennsylvania and the United States of America.

(3) Discrimination in employment prevents the gainful employment of large segments of citizens of the City, tends to impair the City's productive capacity, reduce the public revenues, impose substantial financial burdens upon the public for relief and welfare, and tends to create breaches of the peace and depressed living conditions which breed crime, vice, juvenile delinquency and disease, and is detrimental to the public safety, economic growth and general welfare of the City of Pittsburgh.

(4) Discrimination in housing results in overcrowded, segregated areas with substandard, unsafe and unsanitary living conditions, which cause increased mortality, disease, crime, vice and juvenile delinquency, fires and risk of fire, intergroup tensions and other evils, all of which increase the cost of government and reduce the public revenues, and result in injury to the public safety, health and welfare of the City of Pittsburgh.

(5) Discrimination in places of public accommodations, resort, recreation, amusement and places of business causes humiliation, embarassment and inconvenience to citizens and visitors of the City, tends to

create breaches of the peace, intergroup tensions and conflicts and similar evils, and is detrimental to the public safety, general welfare and economic growth of the City of Pittsburgh.

(B) Declaration of Policy

It is hereby declared to be the policy of the City of Pittsburgh, in the exercise of its powers for the protection of the public safety and the general welfare, for the maintenance of peace and good government and for the promotion of the City's trade, commerce and manufactures, to assure the right and opportunity of all persons to participate in the social, cultural, recreational and economic life of the City and to assure equal opportunity for all persons to live in decent housing facilities, free from restrictions because of race, color, religion, ancestry, national origin or place of birth.

To accomplish these goals it shall be the public policy of the City of Pittsburgh to prohibit discrimination because of race, color, religion, ancestry, national origin or place of birth in employment, housing and places of public accommodation, resort, recreation or amusement.

SECTION 3. SCOPE OF THE ORDINANCE

This Ordinance applies to discriminatory practices, including but not limited to discrimination in employment, housing and public accommodations, which occur within the territorial limits of the City of Pittsburgh and to employment, contracted for, performed or to be performed within these limits, and to housing accommodation, resort, recreation and amusement located within the territorial limits of the City.

SECTION 4. DEFINITIONS

As used in this Ordinance, the following terms shall have the meanings indicated, unless a different meaning clearly appears from context:

(a) Commission—The Commission on Human Relations established in the office of the Mayor of the City of Pittsburgh by this Ordinance.

(b) Discriminate and discrimination — The terms "discriminate" and "discrimination" include any difference in treatment based on race, color, religion, ancestry, national origin or place of birth.

(c) Employer — Any person who employs five or more employees, exclusive of the parents, spouse or children of such person, including the City of Pittsburgh, its departments, boards, commissions, and authorities, and any other governmental agency within its jurisdiction, but excluding any religious, fraternal, charitable or sectarian organization which is not supported in whole or part by any governmental appropriations.

(d) Employment — The term "employment" shall not include the employment of individuals in domestic service.

(e) Employment Agency — Any person regularly undertaking with or without compensation to procure opportunities for employment or to procure, recruit, refer or place employees.

(f) Housing Accommodation — (1) a building, structure or portion thereof which is used or occupied, or is intended, arranged or designed to be used or occupied, as a home, residence or sleeping

place by a person, by a family or by a group of persons living together, or (2) a parcel of real property or lot available for the construction of a housing accommodation.

(g) Labor Organization — Any organization which exists for the purpose in whole or in part of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid protection in relation to employment.

(h) Lending Institution — Any bank, insurance company, saving and loan association, or any other person regularly engaged in the business of lending money or guaranteeing loans.

(i) Owner — The term "owner" includes the owner, co-owner, lessee, sub-lessee, mortgagee, assignee, manager, agent, or any other person having the right of ownership or possession or the authority to sell, rent or lease any housing accommodation, or any person having an equitable or security interest in any housing accommodation, including the City of Pittsburgh and its departments, boards, commissions, and authorities.

(j) Person — Any individual, partnership, corporation, labor organization or other organization or association, including those acting in a fiduciary or representative capacity, whether appointed by a court or otherwise. The term person, as applied to partnerships or other organizations or associations, includes their members, and as applied to corporations includes their officers.

(k) Real Estate Broker — Any natural person, partnership, corporation or other association which for a fee or other valuable consideration manages, sells, purchases, exchanges or rents or negotiates, or offers or attempts to negotiate the sale, purchase, exchange or rental of, the real property of another, or holds itself out as engaged in the business of managing, selling, purchasing, exchanging or renting the real property of another, or collect rent for the use of the real property of another, and includes real estate salesman or agents or any other person employed by a real estate broker to perform or to assist in the performance of his business.

(l) Public Accommodation, Resort, Recreation or Amusement — The term "Public Accommodation, Resort, Recreation or Amusement" includes any place, business or activity which is open to, accepts or solicits the patronage of the general public or offers goods, services or recreation to the general public.

ECTION 5. COMMISSION ON HUMAN RELATIONS:

(a) There is hereby established in the Office f the Mayor, a Commission on Human Relations to dminister, implement and enforce the provisions of his ordinance.

(b) The Commission shall consist of fifteen (15) embers to be appointed by the Mayor for a four-year rm. Commissioners may be reappointed to succesve terms of office. Each member of the Commission all continue to serve after his term until his succesr has been appointed and qualified.

(c) The term of all present members of the Commission shall not be affected by the enactment of this ordinance.

(d) The Commission shall elect one of its members as chairman and may elect such other officers as it may deem necessary. The Chairman may, with the approval of the Commission, appoint such committees as may be necessary to carry out the powers and duties of the Commission and the Commission may authorize such committees to take any necessary action for the Commission.

(e) The Commission shall adopt such rules and regulations for its own organization, operations and procedures as the Commission shall deem necessary to administer, implement and enforce this ordinance.

(f) The Commission shall hold at least ten monthly meetings during each calendar year. Five (5) members of the Commission shall constitute a quorum for the transaction of business, and a majority vote of those present at any meeting shall be sufficient for any official action taken by the Commission, except that approval of a majority of the members of the Commission shall be required before any public hearing may be held.

(g) The members of the Commission shall serve without compensation, but they may be reimbursed for all expenses necessary incurred in the performance of their duties in accordance with appropriations made by City Council.

SECTION 6. EXECUTIVE DIRECTOR

(a) The Mayor shall appoint an Executive Director and such other personnel as may be authorized by City Council to assist the Commission in administering, implementing and enforcing the provisions of this ordinance. In proposing a budget for the operation of the Commission and in selecting the Executive Director and other personnel, authorized by City Council, the Mayor shall take into consideration the recommendations of the Commission.

(b) The Executive Director shall serve as the staff executive officer for the Commission. He shall promote the efficient transaction of its business, the orderly handling of complaints and other matters before the Commission, and shall supervise the Commission, and shall supervise the Commission staff.

(c) The Commission may authorize the Executive Director to initiate complaints of unlawful practices, as set forth in this ordinance.

SECTION 7. POWERS AND DUTIES OF THE COMMISSION ON HUMAN RELATIONS

The Commission shall have the power and it shall be its duty to:

(a) Initiate, receive, investigate and seek the satisfactory adjustment of complaints charging unlawful practices, as set forth in this ordinance.

(b) Initiate or receive and investigate other complaints of discrimination against any person because of race, color, religion, ancestry, national origin or place of birth, and to seek the satisfactory adjustment of such complaints. Any complaint filed under this subsection

which the Commission believes may constitute a violation of a law of the United States of America or the Commonwealth of Pennsylvania may be certified to the City Solicitor for such actions as he may deem proper.

(c) Hold public hearings, subpoena witnesses and compel their attendance, administer oaths, take the testimony of any person under oath, and in connection therewith require the production of evidence relating to any matter under investigation or any question before the Commission, make finds of fact, issue orders and publish such findings of fact and orders and do all other things necessary and proper for the enforcement of this ordinance.

(d) Certify upon the request of any person that a particular occupation or position is exempt from the provisions of this ordinance relating to unlawful employment practices if the Commission finds that the occupation of a person or persons of a particular race, color, religion, ancestry, national origin or place of birth, and that such certification is not sought as means of circumventing the spirit and purpose of this ordinance, the burden of proving the facts required for such a finding to be in each instance upon the person requesting the certification of exemption from the provisions of this ordinance.

(e) Study and investigate by means of pub-hearings or otherwise any conditions having an adverse effect on intergroup relations in the City of Pittsburgh and to study the problems of prejudice, intolerance, bigotry and discrimination as they effect the public safety and general welfare of the City of Pittsburgh.

(f) Institute and conduct educational and other programs to promote the equal rights and opportunities of all persons, regardless of their race, color, religion, ancestry, national origin or place of birth, and to promote understanding among persons and groups of different races, colors, religion, ancestries, national origins or places of birth. In the performance of its duties, the Commission may cooperate with interested citizens, private agencies and agencies of the federal, state and local governments.

(g) Issue publications and reports of investigation and research in the field of human relations, and to cooperate with and accept grants from public and private agencies, including foundations, colleges and universities, engaged in similar research.

(h) Request other departments, boards and commissions of the City government to assist in the performance of its duties, and such other departments, boards and commissions shall cooperate fully with the Commission.

(i) Assist in the enforcement of fair practices in City contracts.

(j) Render from time to time a written report of its activities and recommendations to the Mayor and to City Council.

(k) Recommend legislation to promote and insure equal rights and opportunities for all persons regardless of their race, color, religion, ancestry, national origin or place of birth.

(l) Adopt such rules and regulations as may be necessary to carry out the purposes and provisions of this ordinance.

SECTION 8. UNLAWFUL EMPLOYMENT PRACTICES

It shall be an unlawful employment practice, except where based upon applicable national security regulations established by the United States, by the Commonwealth of Pennsylvania, or by any political subdivision of the Commonwealth having jurisdiction in the City of Pittsburgh, or except where based upon a bona fide occupational exemption certified by the Commission in accordance with Section 7, subsection (d) of this ordinance:

(a) For any employer to refuse to hire any person or otherwise discriminate against any person with respect to hiring, tenure, compensation, promotion, discharge or any other terms, conditions or privileges directly or indirectly related to employment because of race, color, religion, ancestry, national origin or place of birth.

(b) For any employer, employment agency or labor organization to establish, announce or follow a policy of denying or limiting, through a quota system or otherwise, the employment or membership opportunities of any person or group of persons because of race, color, religion, ancestry, national origin or place of birth.

(c) For any employer, labor organization, employment agency or any joint labor-management committee controlling apprentice training programs to deny to or withhold from any person the right to be admitted to or participate in a guidance program, an apprenticeship training program, an on-the-job training program or any other occupational training program because of race, color, religion, ancestry, national origin or place of birth.

(d) For any employer, employment agency or labor organization to require of any applicant for employment or membership any information concerning race, color, religion, ancestry, national origin or place of birth.

(e) For any "employer," employment agency or labor organization to publish or circulate, or to cause to be published or circulated, any notice or advertisement relating to "employment" or membership which indicates any discrimination because of race, color, religion, ancestry, national origin or place of birth.

(f) For any employment agency to fail or refuse to classify properly or refer to employment or otherwise to discriminate against any person because of race, color, religion, ancestry, national origin or place of birth.

(g) For any employer substantially to confine or limit recruitment or hiring of employees, with intent to circumvent the spirit and purpose of this ordinance, to any employment agency, employment service, labor organization, training school, training center or any other employee-referring source which serves persons who are predominantly of the same race, color, religion, ancestry, national origin or place of birth.

(h) For any labor organization to discriminate against any person in any way which would deprive or limit his employment opportunities or otherwise adversely affect his status as an applicant for employment or as an employee with regard to tenure, compensation, promotion, discharge or any other terms, conditions or privileges directly or indirectly related to employment because of race, color, religion, ancestry, national origin or place of birth.

(i) For any employer, employment agency or labor organization to discriminate against any person because he has opposed any practice forbidden by this ordinance or because he had made a complaint or testified or assisted in any manner in any investigation or proceeding under this ordinance.

(j) For any person, whether or not an employer, employment agency or labor organization, to aid, incite, compel, coerce or participate in the doing of any act declared to be an unlawful employment practice by this ordinance, or to obstruct or prevent any person from enforcing or complying with the provisions of this ordinance or any rule, regulation or order of the Commission, or to attempt directly or indirectly to commit any act declared by this ordinance to be an unlawful employment practice.

SECTION 9. UNLAWFUL HOUSING PRACTICES

It shall be an unlawful housing practice, except as otherwise provided in this section:

(a) For any owner, real estate broker or any other person to refuse to sell, lease, sublease, rent, assign or otherwise transfer, or to refuse to negotiate for the sale, lease, sublease, rental, assignment or other transfer of the title, leasehold or other interest in any housing accommodation to any person, or to represent that any housing accommodation is not available for inspection, sale, lease, sublease, rental, assignment or other tranfer when in fact it is so available, or otherwise to deny or withhold any housing accommodation from any person because of race, color, religion, ancestry, national origin, or place of birth, or to discriminate against, segregate or assign quotas to any person or group of persons in

connection with the sale, lease, sublease, rental, assignment or other transfer of the title, leasehold, or other interest in any housing accommodation or housing accommodations.

(b) For any person, including any owner or real estate broker, to include in the terms, conditions or privileges of any sale, lease, sublease, rental, assignment or other transfer of any housing accommodation any clause, condition or restriction discriminating against, or requiring any other person to discriminate against, any person in the use or occupancy of such housing accommodation because of race, color, religion, ancestry, national origin or place of birth.

(c) For any person, including any owner or real estate broker, to discriminate in the furnishing of any facilities or services for any housing accommodation because of race, color, religion, ancestry, national origin or place of birth.

(d) For any person, including any owner or real estate broker, to publish, circulate, issue or display, or cause to be published, circulated, issued or displayed, and communication, notice, advertisement or sign of any kind relating to the sale, rental, lease, sublease, assignment, transfer or listing of a housing accommodation or accommodations which indicates any preference, limitation, specification or discrimination based on race, color, religion, ancestry, national origin, or place of birth.

(e) For any person, including any bank, banking organization, mortgage company, insurance company or other financial or lending institution, or any agent or employee thereof, to whom application is made for

financial assistance for the purchase, lease, acquisition, construction, rehabilitation, repair or maintenance of any housing accommodation or housing accommodations:

(1) to discriminate against any person or group of persons because of race, color, religion, ancestry, national origin or place of birth of such person or group of persons or of the prospective occupants or tenants of such housing accommodation in the granting, withholding, extending, modifying, or renewing, or in the rates, terms, conditions or privileges of any such financial assistance or in the extension of service in connection therewith; or

(2) to use any form of application for such financial assistance or make any record or inquiry in connection with applications for such financial assistance which indicates, directly or indirectly, any limitation, specification or discrimination as to race, color, religion, ancestry, national origin or place of birth, or any intent to make any such limitation, specification or discrimination.

(f) For any real estate broker or real estate salesman or agent, or any other person for business or economic puposes, to induce, directly or indirectly, or to attempt to induce directly or indirectly, the sale or rental or the listing for sale or rental, of a housing accommodation by representing that a change has occurred or will or may occur with respect to the racial, religious or ethnic composition of the street, block, neighborhood or area in which said housing accommodation is located.

(g) For any person, whether or not a real estate broker, real estate salesman or agent, owner or lending

institution to aid, incite, compel, coerce or participate in the doing of any act declared to be an unlawful housing practice under this ordinance, or to obstruct or prevent enforcement or compliance with the provisions of this ordinance or any rule, regulation or order of the Commission, or to attempt directly or indirectly to commit any act declared by this ordinance to be unlawful housing practice.

(h) Nothing in this ordinance shall bar any religious or sectarian institution or organization, or any charitable or educational organization which is operated, supervised or controlled by or in connection with a religious or sectarian organization, or any bona fide private or fraternal organization from limiting admission to or giving preference to persons of the same religion or sect, or to members of such private or fraternal organization, or from making such selection as is calculated by such organization to promote the religious or sectarian principles or the aims, purposes or fraternal principles for which it is established or maintained.

### Section 10. Unlawful Public Accommodation Practices

It shall be an unlawful public accommodation practice:

(a) For the owner, lessee, proprietor, manager, superintendent, agent or employee of any business or place of public accommodation, resort, recreation or amusement to:

(1) refuse, withhold from or deny to any person because of his race, color, religion, ancestry, national origin or place of birth, either directly or indirectly,

any of the accommodations, advantages, facilities, services or privileges, products of goods of such place of public accommodation, resort or amusement; or

(2) publish, circulate, issue, display, post or mail, either directly or indirectly, any written or printed communication, notice or advertisement to the effect that any of the accommodations, advantages, facilities, goods, products, services and privileges of any such place shall be refused, withheld or denied to any person on account of race, color, religion, ancestry, national origin or place of birth, or that the patronage of any person of any particular race, color, religion, ancestry, national origin or place of birth is unwelcome, objectionable, or not acceptable, desired or solicited.

(b) For any person, whether or not included in Section 10(a) of this ordinance, to aid, incite, compel, coerce or participate in the doing of any act declared to be an unlawful public accommodations practice under this ordinance.

SECTION 11. OBSTRUCTION OF FAIR PRACTICES

It shall be unlawful for any person, whether or not within the named classifications set forth in this ordinance, to aid, incite, compel, coerce or participate in the doing of any act declared to be an unlawful practice under this ordinance, or to obstruct or prevent enforcement or compliance with the provisions of this ordinance or any rule, regulation or order of the Commission or to attempt directly or indirectly to commit any act declared by this ordinance to be an unlawful practice.

SECTION 12. CITY CONTRACTS

(a) All contracts of the City of Pittsburgh and its contracting agencies shall obligate the contractor to comply with this ordinance and with any state or federal law or laws or regulations relating to unlawful employment practices in connection with any work to be performed thereunder and shall require the contractor to include a similar provision in all subcontracts.

(b) The Commission shall promulgate rules and regulations for the processing of complaints of discrimination received under this section.

SECTION 13. PROCEDURE

(a) A complaint charging that any person has engaged or is engaging in any unlawful practice as set forth in this ordinance, may be made by the Commission, by an aggrieved person or by an organization which has as one of its purposes the combating of discrimination or the promotion of equal opportunities, and any complaint may be amended by the complainant or the Commission at any time before final action has been taken by the Commission, in accordance with such rules and regulations as the Commission shall prescribe.

(b) The complaint shall be in writing, signed and verified, and include the name and address of the person or persons alleged to have committed the unlawful practice and the particulars thereof and such other information as may be required by the Commission.

(c) The Executive Director and staff shall make a prompt and full investigation of each complaint of an unlawful practice and report to the Commission.

(d) If the Commission shall determine that there is no basis for the allegations in a complaint, the complaint shall be dismissed and the complainant notified in writing. Within ten (10) days from the receipt of such notice, the complainant or his attorney, may file with the Commission a request for review and the Commission shall provide the complainant and his attorney an opportunity to appear before the Commission, a member thereof, or a staff representative of the Commission. After such a review the Commission may reverse its decision, or if the Commission or its representative determines that there is no basis for the allegation, the dismissal of the complaint shall be affirmed and there shall be no further review of such decision.

(e) If the Commission determines after investigation that probable cause exists for the allegations made in the complaint, it may attempt to eliminate the unlawful practice by means of private conferences or meetings with all parties. The Commission shall not make public the details of such informal proceedings, but it may pubish the terms of any agreement when a complaint has been satisfactorily adjusted.

(f) If the Commission determines that a housing accommodation or housing accommodations involved in a complaint of an unlawful housing practice under Section 9 of this ordinance may be sold, rented or otherwise disposed of, before a determination of the case has been made, and the Commission believes that there is probable cause for the complaint, the Commission may request the City Solicitor to seek an injunction restraining the sale, rental, or other disposition of the housing

accommodation or housing accommodations in accordance with the provisions of Section 9.1 of the Pennsylvania Human Relations Act of October 27, 1955, P. L. 744, added by Act No. 533, approved January 24, 1966, as hereafter amended, supplemented or modified by the General Assembly of Pennsylvania.

(g) In any case of failure to eliminate the unlawful practice charged in the complaint by means of informal proceedings, or in advance thereof, if in the judgment of the Commission the facts so warrant, the Commission may hold a public hearing to determine whether or not an unlawful practice has been committed or, without holding such a hearing, certify the case to the City Solicitor in accordance with Section 14 of this ordinance.

(h) Where a public hearing is ordered, the Commission shall designate one or more members to conduct such a hearing. The Commission shall serve upon the person charged with having engaged or engaging in the unlawful practice, hereinafter referred to as respondent, a statement of the charges made in the complaint or amended complaint and a notice of the time and place of the hearing. The hearing shall be held not less than ten (10) days after the service of the statement of charges.

The respondent shall have the right to file an answer to the statement of charges, to appear at the hearing in person or to be represented by an attorney, or, subject to the approval of the hearing panel, by any other person, and to examine and cross-examine witnesses. The complainant shall also have the right to be represented by an attorney, or subject to the approval of the hearing panel, by any other person. The Commis-

sion shall not be bound by the strict rules of evidence prevailing in courts of law or equity. The testimony, taken at the hearing, shall be under oath and may be transcribed.

(i) If upon all the evidence presented, the Commission finds that the respondent has not engaged in any unlawful practice, it shall state its findings of fact in writing and dismiss the complaint. If upon all the evidence presented, the Commission finds that the respondent has engaged or is engaging in an unlawful practice, it shall state its findings of fact in writing and shall issue such order in writing as the facts warrant to effectuate the purposes of this ordinance. Such order may require the respondent to cease and desist from such unlawful practice and to take such affirmative action, including, but not limited to, the hiring, reinstatement or upgrading of employees, with or without back pay, admission or restoration to membership in any respondent labor organization, the selling, renting or leasing of a housing accommodation or housing accommodations upon equal terms and conditions and with such equal facilities, services and privileges, the tendering of money, whether or not secured by mortgage or otherwise for the acquisition, construction, rehabilitation, repair or maintenance of any housing accommodation, the granting, permitting, selling or admission to any of the accommodations, advantages, facilities, services or privileges, products or goods of any respondent place of public accommodation, resort, recreation or amusement, upon such equal terms and conditions to any person discriminated against or to all persons as, in the judgment of the Commission, will effectuate the purpose of this ordinance and are warranted by the facts presented

at the hearing, including a requirement for a report or reports of the manner of compliance. Copies of the order shall be served on all parties.

### Section 14. Enforcement

In the event the respondent refuses or fails to comply with any order of the Commission or violates any of the provisions of this ordinance, the Commission shall certify the case and the entire record of its proceedings to the City Solicitor, who shall invoke the aid of an appropriate court to secure enforcement or compiance with the order or to impose the penalties set forth in Section 15, or both.

### Section 15. Penalties

Any person who shall vioate any provision of this ordinance relating to unlawful practices, or any rule or regulation pertaining thereto adopted by the Commission or any order of the Commission, shall be subject to a fine of not more than Three Hundred Dollars ($300.00) and in default of payment of the fine and costs shall be subject to imprisonment for a period not exceeding ninety (90) days.

### Section 16. Severarility

The provisions of this ordinance are severable and if any provision, sentence, clause, section or part thereof is held illegal, invalid or unconstitutional or inapplicable to any person or circumstances, such illegality, invalidity, unconstitutionality or inapplicability shall not affect or impair any of the remaining provisions, sentences, clauses, sections or parts of the ordinance or their application to other persons or circumstances. It

is hereby declared to be the legislative intent that this ordinance would have been adopted if such illegal, invalid or unconstitutional provision, sentence, clause, section or part had not been included therein, and if the person or circumstances to which the ordinance or any part thereof is inapplicable had been specifically exempted therefrom.

SECTION 17. SAVING CLAUSE

The provisions of this ordinance, so far as they are the same as those of ordinances repealed by this ordinance, are intended as a continuation of such ordinances and not as new enactments. The provisions of this ordinance shall not affect any act done or any complaint or proceeding pending under authority of the repealed ordinances. All rules and regulations adopted pursuant to any ordinance repealed by this ordinance shall continue with the same force and effect as if such ordinance had not been repealed.

SECTION 18. EFFECTIVE DATE

The effective date of this ordinance is immediately.

SECTION 19. REPEAL

Ordinance No. 237, approved June 25, 1955, Ordinance No. 523, approved December 8, 1958, and Ordinance No. 106, approved March 10, 1966, are hereby repealed absolutely. Any other ordinance or part of ordinance, conflicting with the provisions of this ordinance, be and the same is hereby repealed, so far as the same affects this ordinance.

**Ordinance Number 395**

Enacted into law by the Council of the City of Pittsburgh on July 3, 1969. Approved by the Mayor, July 7, 1969. Recorded in Volume 70, Page 691, in the office of the City Clerk.

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AN ORDINANCE—Amending and supplementing Ordinance No. 75, approved February 28, 1967, entitled "An Ordinance prohibiting discrimination in employment, housing, public accommodations and other areas of inter-group relations in the social, cultural and economic life of the City of Pittsburgh; requiring fair employment practices, fair housing practices and fair public accommodation practices by prohibiting discrimination in employment, housing and public accommodations because of race, color, religion, ancestry, national origin or place of birth; establishing a Commission on Human Relations in the Office of the Mayor and prescribing the powers and duties thereof; providing penalties, and revising and consolidating the ordinance relating thereto," to prohibit discrimination in employment, housing and public accommodations and other areas of inter-group relations in the social, cultural and economic life of the City of Pittsburgh because of sex and to require fair employment practices, fair housing practices and fair accommodation practices by prohibiting discrimination in employment, housing and public accommodations for persons of both sexes.

SECTION 1. That Sections 2(A)(1)(2) and Section 2(B) of Ordinance No. 75, approved February 28, 1967, entitled "An Ordinance prohibiting discrimination

in employment, housing, public accommodations and other areas of intergroup relations in the social, cultural and economic life of the City of Pittsburgh; requiring fair employment practices, fair housing practices and fair public accommodation practices by prohibiting discrimination in employment, housing and public accommodations because of race, color, religion, ancestry, national origin or place of birth; establishing a Commission on Human Relations in the Office of the Mayor and prescribing the powers and duties thereof; providing penalties, and revising and consolidating the ordinance relating thereto," is hereby amended to read as follows:

Section 2. Legislative findings and declaration of policy:

(A) Legislative findings.

(1) The population of the City of Pittsburgh consists of people of every race, color, religion, ancestry, national origin, place of birth and sex, many of whom, by reason of their race, color, religion, ancestry, national origin, place of birth or sex are discriminated against in employment opportunities, places of public accommodation, resort, recreation and amusement, and housing facilities.

(2) Discrimination because of race, color, religion, ancestry, national origin, place of birth or sex, is contrary to the Constitution, laws and policies of the Commonwealth of Pennsylvania and the United States of America.

(B) Declaration of policy.

It is hereby declared to be the policy of the City of Pittsburgh, in the exercise of its powers for the protection of the public safety and the general welfare, for the maintenance of peace and good government and for the promotion of the City's trade, commerce and manufactures, to assure the right and opportunity of all persons to participate in the social, cultural, recreational and economic life of the City and to assure equal opportunity for all persons to live in decent housing facilities, free from restrictions because of race, color, religion, ancestry, national origin, place of birth or sex.

To accomplish these goals, it should be the public policy of the City of Pittsburgh to prohibit discrimination because of race, color, religion, ancestry, national origin, place of birth or sex, in employment, housing and places of public accommodation, resort, recreation or amusement.

SECTION 2. That Section 4(B) of Ordinance No. 75, approved February 28, 1967, entitled as aforesaid, be amended to read as follows:

(B) Discriminate or discrimination — the terms "discriminate" and "discrimination" include any difference in treatment based on race, color, religion, ancestry, national origin, place of birth, or sex.

SECTION 3. That Ordinance No. 75, approved February 28, 1967, entitled as aforesaid, be supplemented by adding thereto a new Section 20 to read as follows:

Section 20. Unlawful Employment, Housing and Public Accommodations Practices Because of Sex.

It shall be an unlawful employment practice, unlawful housing practice or unlawful public accommodation practice for any person to discriminate against any other person in the manner set forth in Sections 8, 9, 10 and 11 of this Ordinance because of sex.

SECTION 4. That any Ordinance or part of Ordinance, conflicting with the provisions of this Ordinance, be and the same is hereby repealed so far as the same affects this Ordinance.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

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No. 72-419

---

PITTSBURGH PRESS COMPANY, *Petitioner,*

v.

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS AND THE CITY OF PITTSBURGH,
AND
THE NATIONAL ORGANIZATION FOR WOMEN, INC.

---

## MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

---

Comes now the American Newspaper Publishers Association, by and through its counsel, and pursuant to Rule 42(3) of this Court, respectfully moves this honorable Court for leave to file an amicus curiae brief

in support of the petition of the Pittsburgh Press Company for a writ of certiorari to the Supreme Court of Pennsylvania, for the following reasons:

1. The American Newspaper Publishers Association (hereinafter "ANPA" or "Association") is a non-profit, membership corporation organized and existing under the laws of the State of New York. Its membership consists of more than 1,000 daily newspapers representing over ninety percent of the total daily and Sunday newspaper circulation in the United States. The Pittsburgh Press, the Pittsburgh Post-Gazette, and seventy-four other newspapers throughout Pennsylvania hold membership in the ANPA.

2. The Petitioner, The Pittsburgh Press Company, and one of the Respondents, The National Organization for Women, Inc., have consented to the filing by the ANPA of a brief amicus curiae in support of the petition for a writ of certiorari. A copy of their written consents have been filed herewith. The ANPA participated in every tribunal below as an amicus. However, the Respondents, the Pittsburgh Commission on Human Relations and the City of Pittsburgh, will not consent to the filing of a brief amicus curiae in this proceeding.

3. The issues presented in this proceeding involve two fundamental points: the propriety, under a city ordinance, of sex-designated column headings in the classified, help-wanted advertising sections of the Petitioner's newspaper; and, the constitutional propriety of the proceedings below wherein the Petitioner's newspaper was found to have "aided and abetted" an unlawful employment practice under the contested city

ordinance by merely maintaining such sex-designated column headings, without any concomitant finding that a specific employer-advertiser, by requesting insertion of an advertisement under a particular column heading, commits an unlawful practice which is "aided and abetted" by Petitioner.

4. These issues are of major importance to a majority of the Association's member newspapers. A significant number of the ANPA's members utilize a system of classifying help-wanted advertising almost identical to the Petitioner's system under attack in this case. Because these members have found that this help-wanted classification system serves the interests of a vast majority of newspaper readers and advertisers; because this manner of advertising display represents more than mere commercial activity and involves essential editorial prerogatives; because the Pittsburgh ordinance in question, and similar ordinances and statutes, exempt many employers and jobs, the Association's member newspapers believe that they are entitled to preserve this system.

5. To our knowledge, this is the first state litigation involving the legality of sex column headings in employment advertising sections of newspapers. For this reason, this case obviously will have great impact throughout this country. Because of this impact, the Association desires to present to this Court for its assistance, the views of its members in regard to the constitutionality, under the First Amendment free press clause and under the Fourteenth Amendment due process clause, of the application of Section 8(j) of the Pittsburgh Human Relations Ordinance to newspapers. The ANPA is hopeful that this Court will

grant review of the important issues raised by this proceeding.

Respectfully submitted,

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# In the Supreme Court of the United States

October Term, 1972
No. 72-419

PITTSBURGH PRESS COMPANY

v.

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS AND THE CITY OF PITTSBURGH

and

THE NATIONAL ORGANIZATION FOR WOMEN, INC.

## ANSWER TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Does the ordinance of the City of Pittsburgh prohibiting a newspaper from arranging help-wanted advertisements under columns labeled "Jobs—Male Interest," "Jobs—Female Interest," and "Jobs—Male—Female" violate the First Amendment of the United States Constitution?

*(Answered in the negative by the Court below.)*

2. Did the proceedings before the City of Pittsburgh Human Relations Commission in any way violate petitioner's right to due process of law?

*(Answered in the negative by the Court below.)*

## COUNTER-STATEMENT OF THE CASE

Respondents are in basic agreement with the p
cedural history set forth by petitioner in its Statem
of the Case.

Respondents are compelled, however, to point o
certain omissions and one misstatement in petitione
synopsis of the evidence presented at the hearing b
fore the Human Relations Commission. Althou
respondents are of the view that the development
constitutional issues does not require an analysis
the evidence, petitioner has referred to a portion
the evidence and respondent is forced to refer to t
record to dispel any possible misapprehension. Vo
ume II of the record on appeal to the Commonweal
Court of Pennsylvania is composed of documenta
evidence showing how petitioner's advertisements a
employers to discriminate against women.

Furthermore, evidence was indeed introduced
prove that a female was refused a job advertised u
der the "Jobs-Male Interest" classification.

## ARGUMENT

### I. The Prohibition of Sex-Segregated Newspaper Advertisements Does Not Violate the First Amendment

The Commonwealth Court of Pennsylvania, in discussing this issue, stated that the Amicus, the American Newspaper Publishers Association, had raised the "specter" of an alleged violation of the newspaper's right to freedom of the press (R. 65a). The Court's appellation is apt, for an issue so lacking in substance is difficult to imagine. The great constitutional guarantee is prostituted when it is sought to be applied in the instant situation.

The City of Pittsburgh Commission on Human Relations, an administrative body created for and devoted to the ideal of protecting civil rights, the Court of Common Pleas of Allegheny County, and the Commonwealth Court of Pennsylvania, all considered this issue, and found petitioner's First Amendment argument totally lacking in merit. They cited numerous cases, both federal and state, holding that commercial advertising may not avoid police power regulation by crying "First Amendment."

This Honorable Court in *Branzburg v. Hayes*, U.S. , 92 S. Ct. 2646, 2657 (1972), has recently had occasion to uphold the validity of state statutes

of general applicability which incidentally affect the press:

> "It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. Under prior cases, otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed. The Court has emphasized that '[t]he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and properties of others.' Associated Press v. NLRB, 301 U.S. 103, 132-133, 57 S. Ct. 650-656, 81 L. Ed. 953 (1937). It was there held that the Associated Press, a news-gathering and disseminating organization, was not exempt from the requirements of the National Labor Relations Act. The holding was reaffirmed in Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 192-193, 66 S. Ct. 494, 497-498, 90 L. Ed. 614 (1946) where the Court rejected the claim that applying the Fair Labor Standards Act to a newspaper publishing business would abridge the freedom of press guaranteed by the First Amendment. See also Mabee v. White Plains Publishing Co., 327 U.S. 178, 66 S. Ct. 511, 90 L. Ed. 607 (1946). Associated Press v. United States, 326 U.S. 1, 65 S. Ct. 1416, 89 L. Ed. 2013 (1945), similarly overruled assertions that the First

Amendment precluded application of the Sherman Act to a news gathering and disseminating organization. Cf. Indiana Farmer's Guide Publishing Co. v. Prairee Farmer Publishing Co., 293 U.S. 268, 276, 55 S. Ct. 182, 184, 79 L. Ed. 356 (1934); Citizen Publishing Co. v. United States, 394 U.S. 131, 139, 89 S. Ct. 927, 931, 22 L. Ed. 2d 148 (1969); Lorain Journal Co. v. United States, 342 U.S. 143, 155, 156, 72 S. Ct. 181, 187-188, 96 L. Ed. 162 (1951). Likewise, a newspaper may be subjected to nondiscriminatory forms of general taxation. Grosjean v. American Press Co., 297 U.S. 233, 250, 56 S. Ct. 444, 449, 80 L. Ed. 660 (1936); Murdock v. Pennsylvania, 319 U.S. 105, 112, 63 S. Ct. 870, 874, 87 L. Ed. 1292 (1943).

"The prevailing view is that the press is not free with impunity to publish everything and anything it desires to publish. Although it may deter or regulate what is said or published, the press may not circulate knowing or reckless falsehoods damaging to private reputation without subjecting itself to liability for damages, including punitive damages, or even criminal prosecution. See New York Times Co. v. Sullivan, 376 U.S. 254, 279-280, 84 S. Ct. 710, 725-726, 11 L. Ed. 2d 686 (1964); Garrison Publishing Co. v. Butts, 388 U.S. 130, 147, 87 S. Ct. 1975, 1987, 18 L. Ed. 2d 1094 (1967) (opinion of Harlan, J.); Monitor Patriot Co. v. Roy, 401 U.S. 265, 277, 91 S. Ct. 621, 628, 28 L. Ed. 2d 35 (1971). A newspaper or a journalist may

also be punished for contempt of court, in appropriate circumstances. Craig v. Harney, 331 U.S. 367, 377-378, 67 S. Ct. 1249, 1255-1256, 91 L. Ed. 1546 (1947)."

The First Amendment does not protect expression which is "no essential part of any exposition of ideas." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S. Ct. 766 (1942). It is well settled, in particular, that while "freedom of communicating information and disseminating opinion" enjoys a high degree of protection, "the Constitution imposes no such restraint on government as respects purely commercial advertising." *Valentine v. Chrestenson*, 316 U.S. 52, 56, 62 S. Ct. 920 (1942).

In Note, *Freedom of Expression in a Commercial Context*, 78 Harv. L. Rev. 1191 (1965), it is stated:

> "The possibly desirable objectives furthered by advertising would not seem to require its protection by the First Amendment, particularly since the primary purpose of commercial advertising is to advance the economic welfare of business enterprises, over which state and federal governments enjoy wide powers of regulation."

As the Court of Common Pleas of Allegheny County stated in this case (R. 43a):

> "It is difficult to think of a more commercial aspect of the paper than captions to the classified advertising section."

A holding that the City of Pittsburgh Human Relations Ordinance, in prohibiting sex-segregated want

ads, violates the First Amendment, would doom also numerous federal statutes regulating advertising, the constitutionality of which statutes has been consistently upheld both by this Court and by the lower federal courts.

Probably the enactment closest to the ordinance here involved is §804(c) of the Civil Rights Act of 1968, 42 U.S.C. §3604(c), which provides as follows:

> §3604. Discrimination in the sale or rental of housing
>
> (c) [It shall be unlawful] to make, print, or publish, or cause to be made, printed, or published, any notice, statement, or advertisement with respect to the sale or rental of a dwelling that indicates any preference, limitation or discrimination based on race, color, religion, or national origin or an intention to make any such preference, limitation, or discrimination."

In *United States v. Hunter*, 459 F. 2d 205 (4th Cir. 1972, Sobeloff, S. J.), petition for certiorari filed July 15, 1972, and pending at No. 72-146, the Government sought an injunction against a newspaper which had published certain discriminatory advertisements. Although refusing an injunction, the District Court entered a declaratory judgment sustaining the constitutionality of the above-quoted section against the assertion that it was violative of the newspaper's First Amendment rights. The publisher, represented by the same counsel which represented the Amicus, American Newspaper Publishers Association,

in the instant proceedings, appealed to the Court of Appeals for the Fourth Circuit, which affirmed in a lengthy and erudite opinion. In the portion of the Court's opinion of particular relevance to this proceeding, the First Amendment argument was rejected on the basis of the line of cases following *Valentine v. Chrestenson*, supra, the "unbroken line of authority from the Supreme Court down which distinguishes between the expression of ideas protected by the First Amendment and commercial advertising in a business context." 459 F. 2d at 211.

The Fourth Circuit opinion in *Hunter* notes that the constitutionality of §3604(c) as applied to newspapers has been upheld by the District Court in *Holmgren v. Little Village Community Reporter* (No. 70 C 2236, N.D. Ill., 1971). The constitutionality of §3604(c) was also sustained in *United States v. A. B. Smythe Company, Inc.* (No. C 69-885, N.D. Ohio, 1970).[1]

Similar statutes have also withstood attack on First Amendment grounds. Although the Court in *Greenfield v. Field Enterprises, Inc.*, 4 EPD ¶7763 (N.D. Ill. 1972), held that the clear language of §703(b) of the Civil Rights Act of 1964, 42 U.S.C. §2000(e)-2(b), excludes newspapers from its coverage, the Court pointed out in dictum that the section is not violative of the First Amendment in prohibiting help-wanted listings under separate male and female headings:

---

[1] A copy of this opinion can be found as an Appendix to the brief of the United States in the Court of Appeals in *Hunter*, supra, certiorari now pending at No. 72-146.

*Argument*

"A first amendment issue has been raised in this case in the brief of the Chicago Tribune Company. This defendant sees the relief sought in this case as a prior restraint on freedom of the press, and clear violation of well-established first amendment protections, and condemns it as a most insidious encroachment upon cherished American rights.

This alarm is without basis. In addition to being the conduits for the transmission of facts and opinions to the American public, newspapers are businesses. In their commercial aspect, they enjoy no special first amendment privileges. If their practices in the commercial business of publishing classified advertisements for compensation violate the Civil Rights Act of 1964, or particularly Title VII, Section 706(b) of that Act, the first amendment does not shield them from the consequences of their activity."

Clearly, under this decision, an employer or labor union or employment agency which published a circular, or which placed an ad in a newspaper with separate male and female headings would be violating the Act. It was so held in *Hailes v. United Air Lines*, 41 U. S. Law Week 1082 (5th Cir. 1972).

The Court in *Camp-of-the Pines v. New York Times Co.*, 184 Misc. 389, 53 N.Y.S. 2d 475 (Sup. Ct. 1945), construed Section 40 of the New York Civil Rights Law to prohibit discriminatory advertising by newspapers. When the "Times" printed the plaintiff's ads without the language "selected clientele", the camp sued for breach of contract. The

Court found that this was code for no blacks or Jews, just as the Commission here found that the headings "Jobs—Male Interest" and "Jobs—Female Interest", constitute a discriminatory device. As one of its bases for granting the "Times' " motion for summary judgment, the Court held that the newspaper would be breaking the law if it printed a discriminatory ad.

Several other federal statutes which prohibit advertising of one type or another have been held not to run afoul of the First Amendment. In *Capital Broadcasting Co. v. Kleindienst*, 405 U.S. , 92 S. Ct. 1289 (1972), aff'g. 333 F. Supp. 582 (D. D.C. 1971) (three-judge court), the Act of April 1, 1970, Pub. L. 91-222, §2, 84 Stat. 89, 15 U.S.C. §1335, prohibiting cigarette advertising on any medium of electronic communication subject to the jurisdiction of the FCC, was held to be constitutional as against First Amendment attacks. The three-judge court pointed out that advertising is not protected the same way other forms of speech are, and stated that Congress has the power to prohibit the advertising of cigarettes in *any* media. See also *Banzhof v. F.C.C.*, 405 F. 2d 1082 (D.C. Cir.) (1968), cert. denied sub. nom. *Tobacco Institute, Inc. v. FCC*, 396 U.S. 842, 90 S. Ct. 50 (1969). Similarly, the Council of the City of Pittsburgh has the authority under its police power to prohibit advertising that aids in discrimination.

In *New York State Broadcasters Assoc. v. United States*, 414 F. 2d 990 (2d Cir. 1969), cert. denied, 396 U.S. 1061, 90 S. Ct. 752 (1970), the Court held that the Act of June 25, 1948, c. 645, 62 Stat. 763, 18 U.S.C. §1304, prohibiting the broadcasting of

lottery information, did not violate the First Amendment.

Even where advertisements are politically motivated, not the situation here by any stretch of the imagination, the courts have sustained their prohibition where reasonable requirements imposed under the police power have not been followed. See *United States v. Scott*, 195 F. Supp. 440 (D. N.D. 1961), upholding against attack on First Amendment grounds the Act of June 25, 1948, c. 645, 62 Stat. 764, 18 U.S.C. §612, prohibiting the publication or distribution of political campaign statements which do not contain the names of those responsible for such statements.

*New York State Broadcaster's Assn. v. United States*, supra, is a particularly important case, for the Court dealt at length with the shibboleth which petitioner has raised here, that the ordinance, as interpreted by the Commission and the courts below, represents the "official government view" that discrimination against women is improper, but that the Press should be free to follow another view. The Court aptly answered that argument:

> ". . . [I]nvoking the specter of an official government view does not dispose of the real issues before us. There is an 'official' government view as to the sale of narcotics, see 21 U.S.C. §§173, 174, the offering of fraudulent securities, see 15 U.S.C. §78j(b), the interstate transportation of wagering paraphernalia, see 18 U.S.C. §1953, and the coercion of employees by employers, see 29 U.S.C. §158(a)(1), to name

only a few. And the view extends to communications which are designed to—and do—directly effectuate these unwanted results. Clearly an advertisement listing the names and addresses of sellers of narcotics or of fraudulent stock could constitutionally be barred. Of course, we do not suggest that lotteries are a swindle or that lotteries and uncontrolled sale of narcotics are equally deserving of condemnation, but Congress had the power to have a 'view' as to these types of conduct and to take steps to inhibit each. Nor do we see a viable distinction here because there is legislative unanimity as to swindling or narcotics but a difference of opinion as to lotteries.

"The real point here is that we are not primarily in the realm of ideas at all but are chiefly concerned with speech closely allied with the putting into effect of prohibited conduct." 414 F. 2d at 996-7.

Neither are we in the realm of ideas in the instant case. The Court of Common Pleas made that clear (R. 43a):

"The Order of the Commission in no way interferes with the editorial or news content of the newspaper. The Press may continue to express its editorial views with freedom. It may editoralize on this elimination of sex-segregated column headings or any other position related to the status of women supported by the publisher and editor. It may report the news on the subject as it sees fit."

It simply may not arrange its advertising columns in such a manner as to aid in discrimination. As the Court stated in *Hunter*, supra, at 212:

> "[A] newspaper will not be insulated from the otherwise valid regulations of economic activity merely because it also engages in constitutionally protected dissemination of ideas."

*Hunter* is also significant for its treatment of the "prior restraint" argument which petitioner makes here, based upon *Near v. Minnesota*, 283 U.S. 697, 51 S. Ct. 625 (1931). Like the "official government view" argument, it is a vital doctrine in its place, but it is misplaced here, as it was in *Hunter* and in the cases cited therein:

> "Congressional regulation of commercial advertising is not barred by Near v. Minnesota, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931), which condemned unlawful prior restraints on free speech. The Supreme Court and lower courts have frequently rejected First Amendment attacks on injunctions when the enjoined conduct or expression was not fully protected by the First Amendment. Lorain Journal Co. v. United States, supra (unanimous opinion upholding injunction prohibiting commercial advertisements of others in violation of the antitrust laws); Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 439, 31 S. Ct. 492, 55 L. Ed. 797 (1911) (upholding injunction against union newspaper promoting boycott). See also Head v. New Mexico Board of Examiners, 374 U.S. 424, 432 N. 12, 83 S. Ct. 1759, 10 L. Ed. 2d

983 (1963) (injunction restraining newspaper from publishing optometrist's advertising affirmed against attack based on the due process clause.)"

Finally, *Hunter* disposes of petitioner's lament that it is made into a screening device, as an enforcement arm of the Commission. Petitioner is not put in any sort of awkward position. It merely must refuse to place any advertisement in a sex-segregated column unless the employer provides a bona fide occupational exemption certificate. See the Commission's Adjudication (R. 13a). If the employer does not produce such a certificate, the sex-segregated ad constitutes discrimination. Thus, here, as in *Hunter*, unlike statutes which make false advertising a crime:

"... a newspaper publisher can easily distinguish between permissible and impermissible advertisements in discharging his duty ..." 459 F. 2d at 213.

In summary, while one is always reluctant to assert that a petition raising an issue involving the fundamental guarantee of freedom of the press is frivolous, it should be apparent that both this Honorable Court and numerous other Courts have over and over again rejected the arguments made by petitioner here, and have held that advertising such as this is not protected by the First Amendment.

## II. The Order That Petitioner Desist From Aiding Employers To Discriminate Was Not Violative of Due Process of Law

Petitioner's second argument asserts a violation of due process of law because petitioner was ordered to eliminate sex-segregated advertising columns without proof that an advertiser actually discriminated in hiring.

It would appear that petitioner has here abandoned the claim made below that it was denied due process because the complaint did not *allege* a violation by a particular employer. Petitioner does quote from Judge Mencer's opinion on this issue, however, and respondent therefore feels compelled to point out that petitioner had ample notice of the charges against it. The complaint filed by Gerald Gardner on behalf of complainant NOW clearly described the act of discrimination as follows:

> "The National Organization for Women charges the Pittsburgh Press with deliberate and constant violations of Section 8(j) of the Human Relations Ordinance as amended by Ordinance 395. The National Organization for Women has attempted on several occasions to convince editors and publishers of the Pittsburgh Press that their policy of allowing employers to place advertisements in the male or female columns, when the jobs advertised obviously do not have bona fide occupational qualifications or exceptions, is unlawful."

*Argument*

The Commonwealth Court held (R. 56a):

> "We hold that the Pittsburgh Press was properly and adequately informed of the charged violation of Subsection 8(j) of the Pittsburgh Human Relations Ordinance, as amended. The appellant newspaper had notice and knowledge of the charge that it was aiding employers to unlawfully discriminate by the placing of employment advertisements under the arbitrarily segregated male and female columns on the advertising pages of the newspaper."

The basic thrust of petitioner's argument here seems to be that it was improperly ordered to eliminate its sex-segregated advertising columns because there was no proof as asserted at page 16 of the Petition, "that any advertiser has in fact used its classified advertisements as a device to deny women equal consideration for employment positions."

Discrimination is defined in §4(B) of the ordinance, as amended by Ordinance No. 395, approved July 7, 1969, as follows:

> "(B) Discriminate or discrimination—
>
> The terms 'discriminate' and 'discrimination' include any difference in treatment based on . . . sex." (R. 107a).

In its adjudication, the Pittsburgh Commission on Human Relations ruled as follows:

> "An employer by causing an employment advertisement to be placed in either the male interest column or female interest column is, in

our judgment, indicating a difference in treatment as to that employment based upon sex, hence engaging in unlawful discrimination." (R. 9a).

Such a conclusion is self-evident and could be sustained absent any evidence whatsoever. As stated by the Court of Appeals for the Fifth Circuit dealing with sex discrimination against males in *Hailes v. United Air Lines*, supra:

> ". . . the placing of the ad in the 'Help Wanted—Female' column without a corresponding ad in the 'Help Wanted—Male' column so plainly indicates a preference for females it cannot be neutralized by the self-conferred title of 'Equal Opportunity Employer.' "[2]

Moreover, as the Commission pointed out, the United State Equal Employment Opportunity Commission, the United States Department of Labor, the Civil Rights Commission of Colorado, and the Nebraska Equal Opportunity Commission have all ruled that the placement of an advertisement in columns headed "Male" or "Female" will be considered an expression of discrimination based on sex (R. 11a-12a).

In addition, however, evidence from petitioner's own Classified Ad Manager, Robert Seli, amply proves that employers who advertise in the "Jobs—

[2] Prior to October of 1969, petitioner's captions read "Male Help Wanted," "Female Help Wanted" and "Male-Female Help Wanted." Since that time to the present they have read "Jobs-Male Interest," "Jobs-Female Interest", and "Male-Female Help." (R. 16a) (Footnote added.)

Male Interest" or "Jobs—Female Interest" columns are discriminating. At page 150a of the record on appeal in the Commonwealth Court, Mr. Seli's testimony was as follows:

"Q. As far as employment opportunity ads are concerned, do your ad takers have the discretion to place jobs in any particular column if the advertiser does not express any preference?

A. No, sir, most of the people who call in have a preference. Let's put it this way. They know where they want the ad to run—automobile or real estate or male interest or female interest. They express this interest where they would like to have this ad placed. In what category. At times, when they do not express a preference, we ask them where they would prefer to have it placed.

Q. If the advertiser clearly expresses a preference for male or female, the Press abides by the preference expressed by the advertiser?

A. Yes, but there is a little difference here. If somebody asks to place a help wanted ad under automobile advertising, we will not accept it. It has to run under help wanted. It's a job offering. It's run under opportunities.

Q. When no preference is expressed by advertisers, you then solicit from the advertiser a response to whether he has a preference?

A. Yes, where they would prefer to have it placed.

Q. In case there is no preference expressed, even after solicitation, who then at the Pittsburgh Press decides which column it goes in?

A. I don't think we have this problem, really.

Q. In each case there is an expression of preference by the advertiser?

A. Yes."

Again, at page 207a of the same record (quoted in the Commission's Adjudication, R. 9a), the same sort of testimony appears:

"Q. Is this the only type of—if I may use the word—education for your advertisers? Do you then proceed to tell them of the several categories that should go under this or that, take your choice?

A. We tell them where the majority is—or we try to find out what type of a person they are looking for. Are they looking for a man, or are they looking for a woman? They know this. And they are interested or more interested in a man or more interested in a woman. They know this, and they state this. This is where they want it."

This is unmistakable evidence that petitioner is aiding employers to discriminate.

In its argument heading, petitioner alleges an absence of proof that an advertiser discriminated in "hiring" in violation of the ordinance. It is unclear to respondents exactly what petitioner means by this statement. If petitioner believes that it is necessary to show that an advertiser who advertised in the "Jobs—Male Interest" column actually refused to hire a female, petitioner ignores the fact that §§8(a) and 8(e) of the Ordinance are separate provisions

(R. 92a-93a). Section 8(a) prohibits refusal to hire, but §8(e) prohibits the placing of a discriminatory advertisement, regardless of whether there is a refusal to hire. As we have just seen above, the advertising was discriminatory. Furthermore, although such evidence is superfluous in order that respondents prevail, the evidence does show, as the opinion of the Commonwealth Court majority point out (R. 58a), that a female who had responded to an ad in the "Jobs—Male Interest" column was refused hiring on the basis of her sex. The testimony of Mrs. Ruth Anderson revealed that she responded to an ad placed in the "Jobs—Male Interest" column for a dishwasher and was advised by an agent of the employer that he had been given specific instructions not to hire a female for the advertised job.

If on the other hand, petitioner is asserting that respondents have not shown that a *particular* employer was violating the ordinance, again the argument is wide of the mark. Respondents have proved violations by numerous employers. The record is replete with advertisements placed in the male column or the female column by particular employers. Almost the entire Volume II of the Record in the Commonwealth Court is devoted to this. Furthermore, the parties stipulated that twenty-five percent of the employers advertising in the Press were located in Pittsburgh. The Commission concluded (R. 12a) that every non-exempt employer who placed an advertisement in the male column or the female column was in violation of §8(e). Surely it is unnecessary to prosecute any or all of the 248,000 persons (or at

least the 62,000 in the City of Pittsburgh) who used the Press Want Ads. The ordinance has no requirement that enforcement proceed against the employer as well as the newspaper. In both *United States v. Hunter,* supra, and *Holmgren v. Little Village Community Reporter,* supra, the proceedings were against the newspapers only, not against those who placed the ads.

While petitioner cries "due process", petitioner is in fact seeking to direct both complainant NOW and the Commission in the enforcement of the ordinance. Petitioner would prefer that enforcement proceedings would proceed employer by employer or advertiser by advertiser, rather than by a single proceeding directed at the root source of the discriminatory advertising.

It is an elementary principle of law that the failure to prosecute all violators does not render an action against one who has violated the law discriminatory or improper. *United States v. Hunter,* supra, at 220.

Respondents have determined that one of the best methods to achieve the eradication of the evil of sex discrimination, an evil well recognized by this Honorable Court in *Reed v. Reed,* U.S. , 92 S. Ct. 251 (1971), is to proceed against those who enable discrimination to flourish, by publishing discriminatory advertisements. Such a method is nowhere prohibited by the ordinance.

Finally, it should be noted that while petitioner couches its argument in terms of due process of law, it is not in actuality complaining about a lack of due

process, but rather of an alleged misconstruction of the ordinance, or an alleged insufficiency of evidence to support the Commission's order. It is respectfully suggested that these are issues of state law over which the Supreme Court of Pennsylvania is the final arbiter.

## CONCLUSION

For the above reasons, respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

EUGENE B. STRASSBURGER, III,
*Exec. Asst. City Solicitor,*

RALPH LYNCH, JR.,
*City Solicitor,*

Attorneys for Respondents.

process, for neglect of an alleged misconception of the ordinance, or an alleged insufficiency of its support. For Commissioner's order, it is suggested that these are matters of state law, the Supreme Court of Pennsylvania is the [illegible]

## CONCLUSION

For the above reasons, respondent respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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City Solicitor,
Attorneys for Respondent.

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# In the Supreme Court of the United States

No. 72-419 October Term, 1972

PITTSBURGH PRESS COMPANY

v.

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS AND THE CITY OF PITTSBURGH

and

THE NATIONAL ORGANIZATION FOR WOMEN, INC.

## OBJECTION TO BRIEF OF AMICUS CURIAE

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pose such a petition unless petitioner agreed to file
its petition for certiorari not later than August 25,
1972. Petitioner so agreed. Although the petition for
certiorari was not actually filed until September 12,
1972, respondents were supplied a draft of the brief
on or about August 25, 1972, and do not complain
about petitioner's late filing.

*Argument*

## OBJECTION TO BRIEF OF AMICUS CURIAE

Respondents, the Pittsburgh Commission on Human Relations and the City of Pittsburgh, have withheld their consent to the filing of a brief amicus curiae in this proceeding. The reason for their so doing is the dilatory nature of such brief.

It is now more than three years since the complaint was filed in this case, and despite the fact that every tribunal considering the issues has agreed with respondents' position, the sex-segregated ads have continued unabated.

The order of the Supreme Court of Pennsylvania denying allocatur was dated June 21, 1972. Shortly thereafter, counsel for petitioner was advised by counsel for respondents that unless a supersedeas were obtained, respondents would take further action to enforce the ordinance. A petition for supersedeas was then filed in the Supreme Court of Pennsylvania. Counsel for respondents indicated that he would oppose such a petition unless petitioner agreed to file its petition for certiorari not later than August 25, 1972. Petitioner so agreed. Although the petition for certiorari was not actually filed until September 12, 1972, respondents were supplied a draft of the brief on or about August 25, 1972 and do not complain about petitioner's late filing.

*Argument*

However, respondents do complain about the attempt of the American Newspaper Publishers Association to file an Amicus Brief three and one-half months after the order of the Pennsylvania Supreme Court denying allocatur, and one and one-half months after the agreed-upon deadline for petitioner to file its petition for certiorari. The petitioner and the American Newspaper Publishers Association have worked in conjunction throughout these proceedings. This late filing of the Brief can only be considered an evasion of the parties' stipulation with regard to the supersedeas. Respondents do not intend to file a response to the Amicus Brief because, fortunately, respondents have anticipated the arguments raised therein. Such a fortuity should not detract from the fact that the Amicus is here attempting to file a brief which might have required an involved response which would have resulted in considerable delay.

Respectfully submitted,

EUGENE B. STRASSBURGER, III,
*Executive Assistant City Solicitor,*

RALPH LYNCH, JR.,
*City Solicitor,*

Attorneys for Respondent.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

---

No. 72-419

---

PITTSBURGH PRESS COMPANY, *Petitioner*

v.

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS AND THE CITY OF PITTSBURGH,

AND

THE NATIONAL ORGANIZATION FOR WOMEN, INC.

---

## BRIEF OF AMICUS CURIAE, THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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### PRELIMINARY STATEMENT

The American Newspaper Publishers Association files this brief as amicus curiae, respectfully urging that this Court issue a writ of certiorari to review the decision of the Supreme Court of Pennsylvania entered in this case on June 21, 1972, denying the petition of the Pittsburgh Press Company for allowance of an

appeal to review the order and decision of the Commonwealth Court of Pennsylvania entered January 27, 1972.

## INTEREST OF THE AMICUS CURIAE

The American Newspaper Publishers Association (hereinafter referred to as "ANPA" or the "Association") is a non-profit, membership corporation organized and existing under the laws of the State of New York. Its membership consists of more than 1,000 daily newspapers, representing over ninety percent of the total daily and Sunday newspaper circulation in the United States. The Pittsburgh Press, the Pittsburgh Post-Gazette, and seventy-four other newspapers located throughout Pennsylvania, hold membership in the ANPA.

Many of the Association's members utilize a gender classification system in their help-wanted advertising sections almost identical to that utilized by the Pittsburgh Press and contested in this action. The majority of the Association's member newspapers have found through years of experience that the system of help-wanted advertising classification that best serves the interests of a significant majority of the job-seeking public, is one which provides advertisers with three column headings (male-female-neuter) under which to place their employment advertisements.

This manner of newspaper advertising display was not instituted nor is it maintained by newspapers to thwart employment opportunities for any sex. Instead, this classification system has, over the years accommodated the desires of those whom it serves in setting out classified ads in the simplest, best and most practical way. It provides the advertiser-employer with a prag-

matic vehicle to reach the audience most probably interested in the position advertised. Moreover, most statutes and ordinances similar to the Pittsburgh city ordinance grant exemptions from coverage to certain employers and for certain jobs. Consequently, and for that reason alone, the Pittsburgh Press and the Association's members are entitled to maintain its classification system.

To the knowledge of your amicus, this is the first state litigation involving the question of the legality of sex classification in the help-wanted advertising sections of newspapers.[1] For this reason, this decision below obviously will have great impact, not only in Pittsburgh and the remainder of Pennsylvania,[2] but also throughout the United States where similar statutes exist. Because of this probable impact, your amicus

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[1] Two federal cases have touched peripherally on this question Neither has reached the merits of the issue involved in this appeal. *N.P.A.* v. *Alexander*, 294 F.Supp. 1100 (D.D.C. 1968) concentrated on both the statutory authority of the Equal Employment Opportunity Commission to promulgate "guidelines" purporting to be substantive regulations and the legal effect of such "guidelines." The former issue remains unresolved by that litigation. But, in connection with the latter issue, the Court held that such "guidelines" do not have the force and effect of law. *Brush* v. *San Francisco Newspaper Printing Co.*, 315 F.Supp. 577 (N.D. Calif. 1970), now on appeal, involved the novel question of whether a newspaper, by publishing help-wanted advertising, was an "employment agency" within the meaning of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(c). The Court in *Brush* had no difficulty in concluding that such activity did not make newspapers "employment agencies" either within the meaning of the Act or within the commonly understood meaning of the term. *See also*, *Greenfield* v. *Field Enterprises, Inc.*, C. A. No. 71 c 2075 (N.D. Ill. E. Div., decided Feb. 1, 1972).

[2] The section of the Pittsburgh ordinance involved herein closely follows its sister section in the Pennsylvania Human Relations Act, 1955, Oct. 27, P.L. 744, as amended, 43 P.S. 951, 955.

desires to present to this Court for its assistance, the views of the majority of its members in regard to the legality of applying Section 8(j) of the Pittsburgh Human Relations Ordinance to newspapers.

## REASONS FOR GRANTING THE WRIT

Without any proof that an employer-advertiser violated the advertising proscriptions of Section 8(e) of the Pittsburgh Human Relations Ordinance,[3] the Pittsburgh Human Relations Commission held that by merely maintaining gender-designated columns for help-wanted classified advertising, the Pittsburgh Press "aided or abetted"[4] employers in the commission of an unlawful employment practice.[5] Accordingly, the Commission ordered the newspaper to totally eliminate the gender-designated column headings.[6]

---

[3] Section 8(e), as amended, provides: "It shall be an unlawful practice . . . (e) For any "employer," employment agency or labor organization to publish or circulate, or to cause to be published or circulated, any notice or advertisement relating to "employment" or membership which indicates any discrimination because of race, color, religion, ancestry, national origin or place of birth."

[4] The aiding and abetting provisions of the Ordinance are set forth in Section 8(j) which provides: "It shall be an unlawful employment practice . . . (j) For any person, whether or not an employer, employment agency, or labor organization, to aid, incite, compel, coerce, or participate in the doing of any act declared to be an unlawful employment practice by this ordinance, or to obstruct or prevent any person from enforcing or complying with the provisions of this ordinance or any rule, regulation, or order of the Commission, or to attempt directly or indirectly to commit any act declared by this ordinance to be an unlawful employment practice."

[5] See the decision of the Pittsburgh Human Relations Commission at p. 1a, 17a of the Appendix to the Petition for a Writ of Certiorari, filed herein.

[6] See order of Pittsburgh Human Relations Commission at p. 18 of the Appendix to the Petition for a Writ of Certiorari filed herein.

Pursuant to Pennsylvania's procedure, the Pittsburgh Press appealed the Commission order and decision to the Court of Common Pleas of Allegheny County, Pennsylvania. That court affirmed the Commission holding in its entirety.[7] Thereafter the Press appealed to the Commonwealth Court of Pennsylvania, and that court affirmed the Commission's order, but slightly modified the order to require elimination of all sex designated column headings, "except as may be exempt under said ordinance."[8] The Supreme Court of Pennsylvania denied the petition of the Press for allowance of an appeal from the Commonwealth Court's decision.[9]

As a result of these decisions, a serious legal anomaly applies to newspapers in connection with the publication of help-wanted, classified advertising. The tribunals below have held that the elements of principal-accessory need not be shown to hold newspapers in violation of the ordinance. Instead, the Press has been found in this proceeding to have aided and abetted employer advertisers in violating the advertising proscriptions of section 8(e)-(j) of the Ordinance, without any finding or proof that any principal violated the ordinance. This is a criminal ordinance providing monetary and jail penalties. The holdings below that a newspaper, by maintaining such column headings aids and abets an unknown act by an unknown person cannot be left stand-

[7] See opinion and order of Court of Common Pleas of Allegheny County, Pennsylvania, at p. 196 of the Appendix to the Petition for a Writ of Certiorari filed herein.

[8] See order of Commonwealth Court of Pennsylvania, at p. 69a of the Appendix to the Petition for a Writ of Certiorari filed herein.

[9] See order of Supreme Court of Pennsylvania, at p. 80a of the Appendix to the Petition for a Writ of Certiorari filed herein.

ing. Yet, without review by this Court this anomaly will exist; and these undisturbed decisions obviously will have far reaching national impact on this aspect of the newspaper publishing business.

Moreover, the decisions below hold that a newspaper may not maintain gender-designated column headings in its help-wanted classified section unless there is an exemption for the advertised job contained in the ordinance. Putting aside for a moment the difficult practical problems of what those holdings mean, it is clear that the tribunals below have unlawfully invaded the area of editorial prerogative. Although few, if any, court decisions have sought to reach or even trace the outer limits of such judgment, it must be recognized that a newspaper's decision as to how advertising shall be displayed in as much an editorial function as its decision as to how its editorial page shall be constructed or what its editorial position shall be on a particular issue of the moment.

We recognize that to those outside the newspaper business, decisions surrounding advertising display may not appear as important as those surrounding other editorial functions. But even one outside the field of journalism would admit that whatever difference exists between the two is only a matter of degree. Both are editorial in nature; infringement of what some may consider the lesser only provides a basis or precedent for a later infringement of the other. This point should not be considered an argument *ad terrorem,* for rights are eroded by slow, almost imperceptible steps, each one providing a precedent for the next. Quite apart from seeking to correct the underlying erroneous interpretation given to Section 8(j) by both bodies below, this Association endeavors to prevent even the smallest step

from being taken which would undermine a newspaper's right to make such editorial policy judgments.

Apparently, the argument for applying Section 8(j) to newspapers proceeds along the following lines. The classified advertising employee taking the advertisement over the telephone or from the mails, is presumed to know whether an advertiser is covered or not covered by the Ordinance. Further, the classified ad taker is presumed to know whether a bona fide occupational qualication exists for the position to be advertised. Finally, acting on the request of the advertiser by inserting these advertisements in columns headed by sex makes the newspaper an aider or abetor within the meaning of Section 8(j) based on its presumed knowledge. Therefore, the argument goes, advertiser and the newspaper, by placing the advertisement in columns labeled by sex *ipso facto,* and without regard to any other question, perpetrate an unlawful employment practice. Although presumed knowledge is the basis for application of Section 8(j) to newspapers, the Court below anomalously stated that newspapers had no duty to screen any employment advertisement.

An examination of analogous cases in the field of false advertising demonstrates the fallacy of this argument. It is an unlawful practice in most states, and under the United States Federal Trade Commission Act, to publish or cause to be published an untrue, false, or misleading advertisement. See e.g., 18 P.S. 4857 (1963); 15 U.S.C. § 52 (1964). Also, most of the state statutes, in one form or another, prohibit one from aiding or abetting the publication of such false advertising However, in no case has the offense of aiding or abetting such false publication been construed to extend to the acceptance and publication of such advertising by a newspaper. In

fact, the extant case law flatly rejects such a construction.[10]

By applying the aiding and abetting provisions to the Pittsburgh Press, the courts and the Commission have made the newspapers of the City of Pittsburgh the enforcement arm of the Pittsburgh Commission on Human Relations in the help-wanted advertising area. Newspapers are, therefore, required to make instantaneous judgments as to whether the placement of an advertisement over a gender-designated column heading runs afoul 8(j).

Given the impracticality of forcing the newspapers to be the enforcement arm of the Pittsburgh Human Relations Commission regarding classified help-wanted advertisements, it is clear that the attempt on the part of the state courts to extend the terms of Section 8(j) of the Ordinance to apply to newspapers runs contra to the First Amendment to the United States Constitution. Certainly, a municipality cannot pierce the shield of the First Amendment to require newspapers to act as their enforcement agency. Further, if Section 8(j) were construed to apply to newspapers in accepting advertisements, newspapers would essentially be required to censor and screen all help-wanted advertisements which come into their offices. Such interference with the day-to-day operations of newpapers is clearly pro-

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[10] Presently, the overwhelming majority of State Printers Ink statutes exempt newspapers from coverage. In the one or two that purportedly cover newspapers in publishing false advertising, coverage is limited to only the event where a newspaper publishes the contested advertisement with actual knowledge of its falsity. *See generally*, Note, *Regulation of Advertising*, 56 Colum. L.Rev. 1018 (1956); *Goldsmith* v. *Jewish Press Pub. Co.*, *Amalgamated Furniture Factories, Inc.* v. *Rochester Times-Union, Inc.*, 128 Misc. 673, 219 N.Y.S. 705 (1927)

scribed by the First Amendment. If a municipality can accomplish such an end under the circumstances of this case, there is little to stop it from making newspapers its enforcement arm in other situations. Such attempts, we strongly urge, are precluded by the First Amendment. *See, Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936); *Near* v. *Minnesota*, 283 U.S. 697 (1931); *New York Times Co.* v. *United States*, U.S. , 39 U.S.L.W. 4879 (U.S. June 30, 1971).

## CONCLUSION

For the reasons stated herein, the American Newspapers Publishers Association strongly urges this Court to grant the Petition for a Writ Of Certiorari filed herein.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-419

PITTSBURGH PRESS COMPANY, Petitioner.

v.

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS AND THE CITY OF PITTSBURGH,

and

THE NATIONAL ORGANIZATION FOR WOMEN, INC., Respondents.

On Writ of Certiorari to the Commonwealth Court of Pennsylvania.

## BRIEF FOR PETITIONER

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and
THE NATIONAL ORGANIZATION FOR WOMEN, INC., Respondents.

On Writ of Certiorari to the Commonwealth Court of Pennsylvania.

## BRIEF FOR PETITIONER

### OPINIONS BELOW

The decision of the Pittsburgh Commission on Human Relations is unreported but is set forth in the Appendix (Pet. App. 1-18).[1] The Court of Common Pleas of Allegheny County's opinion is also set forth in the Appendix (Pet. App. 19-45). The opinion of the Commonwealth Court of Pennsylvania (Pet. App. 46-79, A. 377) is reported at 4 Pa. Cmwlth 488, 287 A.2d 161 (1972). The per curiam opinion of the Supreme Court of Pennsylvania is set forth in the Appendix (Pet. App. 80).

1. "Pet. App." refers to appendix to the petition for certiorari. "A." refers to the separate appendix to the briefs.

*Questions Presented.*

## JURISDICTION

The judgment of the Commonwealth Court of Pennsylvania was entered on January 27, 1972 (Pet. App. 46, A. 377). The decision of the Supreme Court of Pennsylvania denying the petition requesting allowance to appeal the Commonwealth's Court decision was entered on June 21, 1972 by per curiam opinion (Pet. App. 80). The petition for a writ of certiorari was filed on September 12, 1972, and was granted on December 4, 1972. The jurisdiction of this Court rests on 28 U.S.C. §1257(3).

---

## QUESTIONS PRESENTED

1. Does it violate the First Amendment of the Constitution to apply the City of Pittsburgh Ordinance so as to prohibit a newspaper from arranging its help-wanted advertisements columns as "Jobs-Male Interest," "Jobs-Female Interest," and "Jobs-Male-Female"?

2. Is it a violation of due process of law under the Fifth and Fourteenth Amendments of the United States Constitution for a newspaper to be found in violation of the City of Pittsburgh Ordinance as aiding employer-advertisers to discriminate on the basis of sex when no evidence was produced to demonstrate that an advertiser discriminated against women in violation of the Ordinance?

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## CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech; or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fifth Amendment of the United States Constitution provides in part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *

The Fourteenth Amendment of the United States Constitution provides in part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

The relevant provisions of Human Relations Ordinance No. 75 of the City of Pittsburgh as amended by Ordinance No. 395 are as follows:

SECTION 8. UNLAWFUL EMPLOYMENT PRACTICES

* * * *

(e) For any employer, employment agency or labor organization to publish or circulate, or to cause to be published or circulated, any notice or

advertisement relating to employment or membership which indicates any discrimination because of race, color, religion, ancestry, national origin or place of birth.

* * * *

(j) For any person, whether or not an employer, employment agency or labor organization, to aid, incite, compel, coerce or participate in the doing of any act declared to be an unlawful employment practice by this ordinance, or to obstruct or prevent any person from enforcing or complying with the provisions of this ordinance or any rule, regulation or order of the Commission, or to attempt directly or indirectly to commit any act declared by this ordinance to be an unlawful employment practice.

* * * *

SECTION 20. UNLAWFUL EMPLOYMENT, HOUSING AND PUBLIC ACCOMMODATION PRACTICE BECAUSE OF SEX.

It shall be an unlawful employment practice, unlawful housing practice or unlawful public accommodation practice for any person to discriminate against any other person in the manner set forth in Sections 8, 9, 10 and 11 of this Ordinance because of sex.

The Ordinance is set forth in full in the Appendix (Pet. App. 82-108, A. 410-436).

## STATEMENT

The case arose on October 9, 1968 when the National Organization for Women, Inc. (N.O.W.) filed a complaint (A. 4) with the Pittsburgh Commission on Human Relations (Commission) charging the petitioner-appellant Pittsburgh Press Company (Press) with violations of Section 8(j) of Ordinance No. 75, as amended by Ordinance No. 395 of the City of Pittsburgh (A. 410). The Commission found, with one dissenting vote, that probable cause existed to file a complaint, and on November 3, 1969, a public hearing was directed. On January 15 and 16 and February 12 and 26, 1970, hearings were held before the Commission (A. 12).

At the hearings N.O.W. introduced witnesses who testified at length about the traditional roles of women in the job market and the discrimination allegedly practiced by employers in general against women. N.O.W. asserted that the Press was aiding this discrimination by employers and violating the ordinance in question by carrying its help-wanted advertisements in columns headed "Jobs-Female Interest", "Jobs-Male Interest" and "Jobs-Male-Female." No evidence was introduced to prove that a female was refused a job advertised under the heading "Male Interest" or that a male was refused a job advertised under the column heading of "Female Interest" in violation of the Ordinance. There was testimony by one woman indicating possible discrimination, but her testimony did not establish that either the job or the advertiser was covered by the Ordinance (A. 262).

In its pleadings and at the hearings before the Commission, the Press repeatedly contended that it was

denied due process in that it was accused of aiding in the commission of an unlawful act which was not alleged or proven (A. 8). The Press introduced testimony that the column headings it used were designed by it solely to maximize reader response by facilitating study of its columns by job seekers (A. 160-162), and that despite the additional expense incurred in utilizing these headings (A. 160, 163, 169), a policy decision had been made by the Press' Editor, Business Manager, and classified Ad Manager to use them (A. 170). Testimony was also introduced to show that the cultural and biological differences between men and women were reflected in general patterns of job preference by them (A. 187).

On July 23, 1970 the Commission issued its order (Pet. App. 1) providing that the Press must utilize a classification system of employment advertisements with no reference to sex. The Press appealed the order to the Court of Common Pleas of Allegheny County, Pennsylvania. The American Newspaper Publishers Association (ANPA) which had intervened in the Commission proceedings as amicus curiae, was permitted by the Common Pleas Court to intervene again as amicus curiae.

The Press and the ANPA argued that it was a denial of due process of law to find the Press guilty of aiding in any unlawful discriminatory employment practices against females when there was no proof of a single violation of the Ordinance by an advertiser of the Press. The Common Pleas Court found that it was not necessary to prove a specific act of discrimination in order to find that the Press was aiding in an unlawful employment practice. The general designation of sex in

the column heading was found to constitute "aiding" in discrimination under the statute without proof a specific discriminatory act by an advertiser (Pet. App. 36).

The Press also argued that it was a denial of its First Amendment rights to prohibit it from referring in any way to sex in its help-wanted classified advertisement column headings. The Common Pleas Court found that such a prohibition is not a denial of First Amendment rights inasmuch as the classified advertisement section of the Press was a commercial rather than editorial aspect of the newspaper (Pet. App. 43), and that the Commission's prohibition of the use of any reference to sex in column headings was justified solely on the basis that the general captions referring to male and female were offensive to the Ordinance (Pet. App. 35). By order dated March 24, 1971 the Court of Common Pleas of Allegheny County affirmed the order of the Commission solely on testimony given at the Commission hearings.

The Press appealed the decision of the Court of Common Pleas to the Commonwealth Court of Pennsylvania. The Commonwealth Court, in a sharply divided opinion, upheld the decisions and findings of the Commission and the Court of Common Pleas, concluding that the Press was not denied due process of law by having been found to be "aiding" in discrimination when no specific incident of discrimination in employment hiring by an advertiser had been shown. The Court reasoned that since the listing of the want ads under the sex designated column headings was per se discriminatory, there need not be a showing that any woman actually suffered any act of discrimination (Pet. App. 57, A. 388).

On the issue of denial of First Amendment rights, the Commonwealth Court held that advertising, per se, does not come within the purview of the First Amendment and that a prohibition from using sex designated want ad headings was conduct subject to regulation (Pet. App. 65, A. 396).

Two judges of the Commonwealth Court dissented, stating that it was a denial of due process of law to find the Press in violation of the ordinance as aiding an employer when no violation by such employer had been alleged or proven (Pet. App. 79, A. 408).

The Press petitioned the Supreme Court of Pennsylvania for allowance of appeal to review the decision and order of the Commonwealth Court. By per curiam opinion dated June 21, 1972, the Supreme Court of Pennsylvania denied the petition for allowance of appeal, with one justice of the opinion that the appeal should be allowed to review the First Amendment question presented (Pet. App. 80).

## SUMMARY OF ARGUMENT

### I

The newspaper's arrangement of help wanted advertisements by use of gender interest column headings is an activity within the protection of the First Amendment, for such arrangement falls outside the narrow concept of purely commercial advertising usually stated as the test for marking the end limit of First Amendment protection. The newspaper's right to arrange, emphasize, edit, or classify applies to its commercial aspects as well as its editorial and news operation.

Even if coupled with some aspects of a commercial transaction, the newspaper's right to arrange and publish classified advertisements under column headings reflecting a general dichotomy of interest is protected by the First Amendment. The extent of the First Amendment's protection to newspapers in the area of commercial advertising should be at least that afforded under the test of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The total exclusion by the Commonwealth Court of the commercial aspects of a newspaper from the protections of the First Amendment allows government a broad base from which to dictate the manner, emphasis and content of the newspaper's life blood.

The vitality of the press should not be sapped by interpretations of the First Amendment which would convert the business related operations of newspapers into the government's spearhead of social change.

*Summary of Argument.*

II

Due Process requires that there be a reasonable relationship between the evil recognized and the manner in which a governmental body attempts to eliminate that evil. The Pittsburgh Press was found to be aiding employers in denying equal employment opportunities to women by the use of gender designated column headings for employment listings. According to the decision of the Commonwealth Court of Pennsylvania, violation of the Ordinance by aiding in the committing of an unlawful employment practice was established merely by use of the column headings, without proof that any particular act of discrimination took place. The column headings were found to be discriminatory, and therefore per se violative of the Ordinance, because in the Commonwealth Court's opinion, they misstated the true interests of some females who may have an interest in jobs found under the male interest heading. The column headings were ordered eliminated by the Commonwealth Court because this supposed misstatement of female interests fell short of the societal ideal.

The fact that the classification used may fail to reflect the particular interests of some members of either sex tells nothing about the existence of aiding by the Pittsburgh Press in the committing of unlawful employment practices. The lack of a reasonable relationship between the use of gender interest column headings and the fact of an unlawful denial of employment opportunities to women make the standard used by the Commonwealth Court to find the Pittsburgh Press in violation of the Ordinance violative of the Due Process Clause.

## ARGUMENT

### I. Interpreting and Applying the Ordinance of the City of Pittsburgh to Prohibit a Newspaper From Arranging Its Help-Wanted Advertisements Under Columns Headed "Jobs-Male Interest", "Jobs-Female Interest" and "Jobs-Male-Female" Violates the First Amendment.

As formulated by the Editor, Business Manager, and Classified Ad Manager (A. 170) of the Pittsburgh Press the Press' help-wanted advertisement column headings were not intended to and do not in fact discriminate or indicate any discrimination against women. Rather, these headings reflect their view, and hence the newspaper's view, that both sexes will be benefited by being able to locate possible employment opportunities quickly and easily. The Commonwealth Court of Pennsylvania, while absolving the Press of any bad intentions and noting that the Press is "one of the nation's leading civil rights advocates in both word and deed" (Pet. App. 50, A. 381), concluded that this editorially established viewpoint as reflected in the column headings in question, was not protected by the First Amendment (Pet. App. 65, A. 396).

In so doing, the Commonwealth Court placed great weight (Pet. App. 59-61, A. 390-392) upon the official government opinion as set forth by the Pittsburgh Human Relations Commission and the City of Pittsburgh. This official opinion is that the Press' column headings are bad because they reflect outmoded social and economic positions of women and are in and of themselves a device to aid in the repression of the employment opportunities of women.

## *Argument.*

Newspapers are a unique institution contemplated by the framers of the Constitution as being a major instrumentality of the interchange of views, information and opinions in a free society. The protection afforded them was great and not to be eroded by the abrasive winds of social change in the form of restrictive legislation regardless of how meritorious in concept.

The First Amendment's ban against "abridging the freedom of speech; or of the press" forbids the imposition by governmental authorities of socio-economic values so as to prohibit the Press from arranging its newspaper in a manner which it believes, in good faith best meets the needs of its readers. The particular arrangement here in question embodies a commentary on what types of employment may be of more interest to one sex than to another. The protection of the First Amendment is not restricted to commentary appearing in "editorials, or news columns or byline stories" (Pet. App. 66, A. 397). The column headings employed by the Press are no more than a short-hand formulation of the unanimous opinion of the newspaper's Editor, Business Manager, and Classified Ad Manager that there are numerous jobs of more interest to one sex than to another, and that this dichotomy of interest is so general that readers and advertisers are best served by the Press' system of classification which lists jobs under headings designated "Jobs-Male Interest", "Jobs-Female Interest", and "Jobs-Male-Female". If the arrangement of classified advertisements—maintained by the Press for the aforesaid reasons—can be prohibited, and under the logic of the decisions below it can be, the First Amendment's protections are devoid of any real substance beyond the editorial and news pages.

If the Press' arrangement of classified advertisements is not constitutionally protected, then the method in which any item appearing in any newspaper or other organ of the press is arranged, emphasized or edited becomes subject to governmental control merely because its arrangement, emphasis or impact is associated with a difference in treatment as to sex. Under the Commonwealth Court's interpretation of the Ordinance, the appearance of a classified job ad in "Ms" magazine would be unlawful since its placement in a periodical of predominantly female interest indicates an unlawful difference in treatment as to sex.

A. THE PITTSBURGH PRESS' COLUMN HEADINGS DO NOT FIT WITHIN THE DOCTRINE OF "PURELY COMMERCIAL ADVERTISING."

The Commonwealth Court, in failing to consider the possible infringement of First Amendment rights, was laboring under the false assumption that the doctrine of "purely commercial advertising" was applicable to the facts of this case. The court's confusion is understandable since the doctrine, which had its inception in *Valentine v. Chrestensen*, 316 U.S. 52 (1942), has never been fully explained. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 414 (1970).

In *Valentine*, the validity of the Sanitary Code of New York, which prohibited distribution on the streets of "commercial and business advertising matter," was involved. Chrestensen was convicted for distributing a handbill advertising on one side the exhibition of a submarine for which an admission fee was charged and criticizing official public conduct on the other side. The Court upheld the regulation by placing commercial ad-

vertising outside the parameters of the First Amend ment, 316 U.S. at 54:

> We are equally clear that the Constitution im poses no such restraint on government as respect *purely commercial advertising*. Whether, and t what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activ ity shall be adjudged a derogation of the public right of the user, are matters for legislative judg ment. (Emphasis added.)

*Valentine* and subsequent cases interpreting its rationale are neither factually nor in principle appli cable to the Pittsburgh Press' help-wanted advertisemen column headings. The handbill in *Valentine* joined a commercial self-serving invitation to view a submarine with an admittedly protected political critique solely as a subterfuge to evade the ordinance. The Court's holding was based on its explicit recognition of Chres tensen's effort to evade the ordinance. *New York Time Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (dictum) Hence, the Court felt that it "need not indulge in nic appraisal based upon subtle distinctions in the presen instance nor assume possible cases not now presented." 316 U.S. at 55. The Court did not purport to pass on th situation here presented, where protected communica tion is legitimately joined with commercial advertising

Even if advertisers themselves may be subject t regulation under the *Valentine* doctrine, a newspaper' arrangement of advertisements is not thereby deprive of First Amendment protection. There has not bee any finding that the arrangement of the column head ings has been devised in an effort to protect the ads the Press is not trying to circumvent regulation of th

ads' content by connecting the headings to the want ads. Indeed the Commonwealth Court specifically noted that "[t]his is not a matter of whether the Pittsburgh Press intentionally conspired with some employer or employers to discriminate against women" (Pet. App. 61, A.392).

Given the editorial expression implicit is the Press' arrangement of classified advertisements, the meaning of the phrase "purely commercial advertising" becomes crucial. The history of the *Valentine* decision suggests it means advertisements or communication motivated solely by "personal profit." Brief for Petitioner at 16, *Valentine v. Chrestensen,* 316 U.S. 52 (1942).

While focusing on the pure element of profit, the *Valentine* doctrine inherently recognizes the distinction between protecting ideas or opinions and the protection of products. *Developments in the Law: Deceptive Advertising,* 80 HARV. L. REV. 1005, 1030, 1038 (1967). *See also Associated Press v. United States,* 326 U.S. 1, 7 (1945). The distinction is valid since advertisements which misrepresent commercial products have no social value, whereas ideas and opinions — however fallacious — make a distinct contribution to society's ongoing quest for truth. Moreover, the false claims of product advertisements can often be empirically demonstrated, and therefore lend themselves to governmental regulation; but ideas and opinions are not susceptible to a preemptive empirical evaluation by the government. The latter is the essence of thought control and philosophical censorship and thus both dangerous and obnoxious in a democracy. *Cf. Deceptive Advertising, supra,* at 1030.

*Argument.*

The Press is here seeking only constitutional protection for its opinions and editorial functions embodied in its arrangement of column headings. Hence, a reversal of the decision below would have no effect on prior decisions upholding the constitutionality of statutory regulation of product advertising. *See e.g., Capital Broadcasting Co. v. Kleindienst,* 92 S.Ct. 1289 (1972), *aff'd mem.* 333 F. Supp. 582 (D.D.C. 1971); *Donaldson v. Read Magazine,* 333 U.S. 178 (1948).

B. The Pittsburgh Press Designation of Column Headings Is Constitutionally Protected Speech Even If It Is Coupled With "Commercial" Communications.

The apparent breadth of the *Valentine* "commercial" doctrine is questionable. "The ruling was casual, almost offhand. And it has not survived reflection." *Cammarano v. United States,* 358 U.S. 498, 514 (1959) (concurring opinion). The doctrine has been modified to require the application of normal First Amendment tests to determine the constitutionality of attempts to suppress ideas and opinions in a commercial context. *Cf. New York Times Co. v. Sullivan,* 376 U.S. 254, 265-266 (1964); *Smith v. California,* 361 U.S. 147, 150 (1959); *Bread v. City of Alexandria,* 341 U.S. 622, 642, 644 (1951).

As recently reaffirmed in *Branzburg v. Hayes,* 92 S. Ct. 2646 (1972), the test in considering the constitutional effect of a state statute on the press is to balance the individual and social interest in freedom of expression against the social interest sought by the restricting regulation. The Court also noted that the overwhelming weight of authority requires that the "State's interest must be 'compelling' or 'paramount' to justify

even an indirect burden on First Amendment rights." 92 S.Ct. at 2666. In holding that burden had been met, Justice White was careful to point out, 92 S.Ct. at 2656, what the case did not involve:

> We do not question the significance of free speech, press or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated. But this case involves no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish,and no express or implied command that the press publish what it prefers to withhold.
>
> No exaction or tax for the privilege of publishing, and no penalty, civil or criminal, related to the content of published material is at issue here.

These censorial threats to the freedom of the press are squarely presented here. Social commentary in the form of editorial judgment in the arrangement of classified advertising should not and cannot be prohibited on the speculative ground that some women might be psychically influenced by such comment. The Commonwealth Court, 4 Pa. Cmwlth at 463, 287 A.2d at 169, implies that it can and should be:

> The ruling that employment want ad column headings be written asexually is appropriate because it eliminates the difficulties of evaluating sophisticated medical, sociological, and actuarial theories of aggregate differences between sexes. It is proper because it represents the highest degree of societal commitment to the ideal of legal sexual equality. (Pet. App. 61, A. 392)

The Press believes in "legal sexual equality." The Press has established a policy of screening the content of its ads for any hint of discriminatory practice (A. 161-163). In each edition the Press has clearly and conspicuously stated its own nondiscriminatory purpose in using sex designated column headings.[2]

Yet, without any finding that the Press intended to discriminate against women or that there is no factual basis for its system of want ad classification, the Press's ability to voice its social commentary has been circumscribed. Paradoxically then in the area of equal employment opportunities between the sexes, the Press is now being subjected to a more stringent test than in the area of obscenity since material is not considered obscene if it has "even the slightest redeeming social importance."

---

2. This notice appears prominently at the beginning of the want ad section (A. 382) and reads as follows:

> "Notice to job seekers. Jobs are arranged under male and female classifications for the convenience of our readers. This is done because most jobs generally appeal more to persons of one sex than the other. Various laws and ordinances—local, state and federal, prohibit discrimination in employment because of sex, unless sex is a bona fide occupational requirement. Unless the advertisement itself specified one sex or the other, job seekers should assume that the advertiser will consider applicants of either sex in compliance with the laws against discrimination."

The wording of this notice and its accompanying column headings follows the Guideline of the Equal Employment Opportunity Commission which was published in 30 Fed. Reg. 14928 (Dec. 2, 1965). The Commission has since amended its Guideline. *See* 37 Fed. Reg. 6835 (March 30, 1972).

*Cf., Roth v. United States,* 354 U.S. 476, 484 (1957). See also, Brennan, *The Supreme Court and Mieklejohn Interpretation of the First Amendment,* 79 Harv. L. Rev. 1, 7 (1965). The Press is effectively being required to prove empirically the truth of its opinion before it can be published. This is completely contrary to this Court's prior decisions; constitutional protection does not turn upon "the truth, popularity or social utility of the ideas and beliefs which are offered." *N.A.A.C.P. v. Button,* 371 U.S. 415, 445 (1963); *Near v. State of Minnesota,* 283 U.S. 697, 721 (1931).

We disagree with the interpretation of the limited extent of the protection afforded by the First Amendment to commercial aspects of publishing set forth in *United States v. Hunter,* 459 F. 2d 205 (4th Cir.), *cert. den.,* 93 Ct. 235 (1972). *Hunter's* holding that once an advertisement in a business context is involved, the government may regulate with impunity any facet of the operations of a newspaper, editorial or otherwise, associated with publishing that advertisement opens an area of unfettered governmental regulation far beyond the opinion's narrow discussion concerning the content of a particular ad. *Hunter's* complete exclusion from First Amendment protections of what it loosely terms commercial transactions allows government to force newspapers to act as the first line enforcement agencies in the policing of multifarious governmental regulations. Such a burden is obnoxious to the First Amendment. Cf. *Smith v. California,* 361 U.S. 147 (1959).

Moreover, the Court in *Hunter* formulated a rationale of newspaper culpability distinct from the basis of the Commonwealth Court's finding of a violation in

the present case. In *Hunter,* the Court coupled the sus
pect nature of a racial designation used in the body o
an ad with a test of inferred knowledge by the publishe
that the intent of the ad content was to communicate
discriminatory preference:

> A publisher can readily determine from the face o
> an advertisement whether it is intended to expres
> a discriminatory preference. However, the languag
> of the advertisement is couched, the purpose of a
> advertiser who wishes to publish an advertisemen
> in violation of this Act is to communicate his inten
> to discriminate and a newspaper publisher can di
> vine this intent as well as any of his readers. 45
> F. 2d at 213.

While we disagree with a standard which require
newspapers to "divine" the intent of its advertisers, w
submit that the Pittsburgh Press case presents a separ
ate question. In the present case it is the arrangement
chosen by the newspaper to display neutral advertise
ments, and not the content of the ad itself which bear
upon the First Amendment. The arrangement of adver
tisements is not comfortably within the ambit of com
mercial transactions as used in *Hunter,* supra, to de
scribe the limit of First Amendment protection. The
rationale of the Commonwealth Court's decision was no
premised upon the ads content, but rather upon the
newspaper's display of neutral ads by use of gende
designated column headings. The Commonwealth Court
made no finding that this arrangement aided in com
municating an unmistakable intent to communicate
discriminatory preference of the advertiser. Rather, the
Commonwealth Court found that the arrangement dis

played in the form of these column headings was sufficiently "out of line" with the ideals of society to rule its elimination:

> The ruling that employment want ad column headings be written asexually is appropriate because it eliminates the difficulties of evaluating sophisticated medical, sociological, and actuarial theories of aggregate differences between the sexes. It is proper because it represents the highest degree of societal commitment to the ideal of legal sexual equality. (Pet. App. 61, A. 392)

Whatever may be the societal commitment, it can be used to dictate the manner in which we arrange our classified advertisements. We submit the power to dictate in what manner a newspaper arranges its advertisements could only overcome the First Amendment's right to a free and unfettered press when there is a showing of publication of advertisements in a manner which clearly communicates on its face an unmistakable intent to discriminate.

A test thus drawn is consistent with the decision in *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964). Its rule prohibits a public official from recovering damages for a defamatory falsehood "unless he proves that the statement was with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U. S. at 279. The rule here should afford at least as adequate protection for the arrangement of employment advertisements.

C. Social Change Cannot Be Effected at th Expense of Freedom of the Press.

The imperative of the existence of a free and u fettered press is as great today as it was when t First Amendment was adopted by the states. Today, never before since the Sedition Act of 1798, the pre feels its freedom is seriously threatened by a combin tion of judicial rulings and executive decisions. *Se* New York Times, January 1, 1973 at 5, col. 1. Wheth this threat is real or imaginary is immaterial if it h the effect of stifling the freedom of the press.

There are those who feel our system of freedom expression is a wholly inadequate instrument for deali with the urgent problems of the day. Moreover, o system is viewed as an instrument operating again social change and which may have to fall in the proce of change. T. Emerson, *The System of Freedom Expression* 725 (1970). This philosophy when adopt by the government is anathema to our concepts democracy and understanding of the First Amendme as has been recognized by members of this Court. *S Cohen v. California,* 403 U. S. 15, 27 (1971) (Justi Harlan); Brennan, *The Supreme Court and the Meik john Interpretation of the First Amendment,* 79 Ha L. Rev. 1, 15 (1965).

Affirming the decision below may seem to be a sm chip out of the First Amendment, but it would be other unalterable stroke in a chipping process that soon make the First Amendment unrecognizable. fact, a matrix of socioeconomic legislation has, as s in *Hunter* supra, and other cited cases, forceably c

scripted the press as a major, if unwilling, recruit in the fight to accomplish many statutory objectives. Newspapers are now tightly regulated in many aspects by many guidelines, regulations, and laws. They have even had an enforcement function thrust on them, are asked to "divine" intent of advertisers and in our case they are now told how they may arrange their advertising. This is an unreasonable abridgement of freedom of the press.

**II. It Is a Denial of Due Process of Law Under the Fifth and Fourteenth Amendments to Find That a Newspaper Aided an Employer to Discriminate in Employment Solely by Arranging Help-Wanted Advertisements Under Sex-Designated Column Headings Without Proof That an Advertiser Discriminated in Violation of the Ordinance.**

The Commonwealth Court found that the Pittsburgh Press aided employers to discriminate in employment in violation of Section 8(j) of the Ordinance as amended by arranging want-ads under male or female interest column headings. The court held that the column headings, without more, violated the Ordinance:

> If the advertising column headings here are discriminatory, they are in violation of the Ordinance per se, and there need not be a specific 'particular' or an actual discrimination suffered by any particular women. If discriminatory, the column headings were in violation before the first woman actually suffered any act of discrimination (footnote omitted) (Pet. App. 57, A. 388).

Thus, according to the Commonwealth Court: the prohibited aiding in the commission of an unlawful employment practice is committed by the mere use of column headings phrased "Jobs-Male Interest" and "Jobs-Female Interest"; no instance of a particular act of discriminatory practice by any employer-advertiser need be shown; the absence of knowledge by the Pittsburgh Press of any discriminatory practice by the employer-advertiser is irrelevant to the elements of the aiding violation; the fact that the content of the individual ads contain no reference to sex is of no significance, nor does the prominently displayed "Notice to Job Seekers" informing readers that they should assume any job equally available to either sex overcome the discrimination said to be inherent in the use of gender-interest column headings.

The Ordinance thus interpreted by the Commonwealth Court conclusively presumes the occurrence of invidious discrimination by employers and the aiding in such discrimination by the Pittsburgh Press. The Commonwealth Court arrived at this interpretation apparently on the basis of the assumption that the column headings used misstate the job interests of women:

> It is no longer possible to state that all women desire, or have an "interest" in, any one type or classification of work. Some women have the desire, ability and stamina to do any work than men can do. Once we accept such a premise it then becomes logically impossible to permit continued segregation of employment want-ads by column headings for any job coming within the purview of the Ordinance. (Pet. App. 59, A. 390, 391)

*Argument.*

The Commonwealth Court determination of the "per se" illegality of the use of gender interest column headings (even where accompanied by a prominent notice to readers to ensure understanding of the column arrangements) was thus founded upon that court's acceptance of the "premise" that the interests of "some women" may correspond to "any work that men can do." The Press does not dispute this underlying assertion. But the Press submits that such assertion in no way proves that the organization of want ads under its column headings is arbitrary, unreasonable, or invidiously discriminatory on its face. The Commonwealth Court's interpretation of the Ordinance, premised on a finding of per se illegality of "arbitrarily selected column headings" (Pet. App. 61, A. 392) has carried its prohibitions beyond the permissible bounds of the Due Process Clause, for the mere use of gender interest column headings does not have a real and substantial relationship to the existence of a denial of employment opportunity to women on account of sex.

The conclusive presumption of aiding in discrimination from the proof of the use of gender interest column headings is arbitrary, for there is no rational connection between the one fact proved (use of gender interest column headings) and the ultimate fact presumed (actual or indicated sex discrimination in employment practices). See *Tot v. United States,* 319 U.S. 463 (1943) *United States v. Romano,* 382 U.S. 136 (1965); *Griswold v. Connecticut,* 381 U.S. 479, 504 (1965) (concurring opinion).

The presence of the headings in conjunction with the "Notice to Job Seekers" signifies only that the jobs appearing under the female interest heading may be of

particular interest to women. The Commonwealth Court simply equates differentiation by sex on the basis of job interests with the invidious sex discrimination in employment practices prohibited by the Ordinance. This equation is unsound. The editorially established arrangement by "interest"—standing alone—does not establish or indicate a denial of employment opportunity based on sex. Gender interest column headings tell no more about the existence of the ultimate fact of invidious sex discrimination in employment practices than could be presumed if the newspaper published some want ads on the women's pages and others on the sports pages without any column headings. Equating differentiation by interest with invidious discrimination is tantamount to a determination that an employer may not lawfully place employment ads in particular magazines where they are more likely to be seen by women than by men.

The argument that the rationale for use of gender interest headings in employment can be equally applied to support race or national origin headings is inapposite to this case. We do not contend that employment opportunities are *generally* classifiable along racial or nationality lines. On the other hand, the Press believes that the employment patterns in this country *generally* reflect job interest and qualifications along sex lines. Most secretaries and nurses are women and most laborers and managers are men, and therefore it is not unreasonable to believe that most qualified applicants for a job advertised will be attracted from the men or the women presently filling such positions. These examples can be multiplied many times, with the result that a workable classification system arises from the existing de facto di-

vision of employment between males and females in numerous different types of work.

In adopting this workable classification system the Pittsburgh Press is only recognizing and reflecting existing employment patterns for the purpose and with the effect of assuring maximum reader exposure and response to employment advertisements. The possibility that the classifications used do not reflect accurately the inclinations or employment wishes of *all* members of each sex is certainly not such a shortcoming as to justify the conclusion that the newspaper's headings aid in discriminating against women.

## CONCLUSION

FOR THE FOREGOING REASONS, it is respectfully submitted that the decision of the Commonwealth Court of Pennsylvania should be reversed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-419

PITTSBURGH PRESS COMPANY,
*Petitioner.*

v.

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS AND THE CITY OF PITTSBURGH,

AND

THE NATIONAL ORGANIZATION FOR WOMEN, INC.,
*Respondents.*

On Writ of Certiorari to the Commonwealth Court of Pennsylvania

## BRIEF FOR AMICUS CURIAE THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

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No. 72-419

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PITTSBURGH PRESS COMPANY,

*Petitioner.*

v.

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS AND THE CITY OF PITTSBURGH,

AND

THE NATIONAL ORGANIZATION FOR WOMEN, INC.,

*Respondents.*

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**On Writ of Certiorari to the Commonwealth Court of Pennsylvania**

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## BRIEF FOR AMICUS CURIAE THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

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### PRELIMINARY STATEMENT

The American Newspaper Publishers Association s this brief as amicus curiae, urging that the Janu- 27, 1972, Order and Decision of the Commonwealth rt of Pennsylvania be reversed. It is this Order

and Decision which are reviewable here because the Supreme Court of Pennsylvania on June 21, 1972, refused to grant The Pittsburgh Press' Petition for Allowance of Appeal in this action.

## INTEREST OF AMICUS CURIAE

The American Newspaper Publishers Association (hereinafter referred to as "ANPA" or the "Association") is a non-profit, membership corporation organized and existing under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,000 daily newspapers, representing over ninety percent of the total daily and Sunday newspaper circulation in the United States. The Pittsburgh Press, The Pittsburgh Post-Gazette, and seventy-four other newspapers located throughout Pennsylvania, hold membership in the ANPA.

Many of the Association's members utilize a classification system in their help-wanted advertising sections almost identical to that utilized by The Pittsburgh Press and questioned in this action. The vast majority of the Association's member newspapers have found through years of experience that the system of help-wanted advertising classification that best serves the interests of a significant majority of the job-seeking public is one which provides advertisers with three column headings (male-female-neuter) to indicate that the employment advertised may be of more interest to males or females or of equal interest to either.

Because this help-wanted classification system serves the interests of a significant majority of a newspaper's readers and advertisers; because this manner of advertising display and the judgment exercised in classifying employment advertising under such columns represents more than mere commercial activity and

nvolves essential editorial prerogatives; and because he First and Fourteenth Amendments protect the xercise of this judgment, the Association believes that hose of its members which desire to preserve and re- ain such classifications are entitled to do so. For these easons, and in order to communicate its members' nterests in this subject, the Association participated s amicus curiae in the proceedings below.

This appeal presents important national issues as to he extent to which the First Amendment protects ublishers from unwarranted intrusions on the exer- ise of their editorial prerogatives in arranging their ewspapers; and from unreasonable burdens imposed n them by forcing newspapers to arrange their con- ents to conform to the social whims of administrative gencies charged with the enforcement of certain social egislation. Your amicus has noted with mounting con- ern the proliferation of social remedial legislation on oth the State and Federal level which seeks to or oes impose on newspapers the ultimate burden, re- ponsibility and liability for enforcement of the aims f the legislation. The local ordinance questioned in his appeal is representative of the type of legislation hich forces newspapers to publish certain otherwise nocuous advertising at their peril. Indeed, the Pitts- urgh Ordinance is but one of twenty (20) almost iden- cal statutes and ordinances which have been, or based pon the decisions below, could be interpreted to regu- te the editorial conduct of newspapers in arranging eir newspaper format.[1]

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[1] ARIZ. *Civil Rights Act*, Ariz. Rev. Stat. Ann. §§ 41-1463(3), 5) (1972 Supp.); CAL. *Fair Employment Practices Act*, Cal. abor Code Ann. §§ 1420(d),(f) (West 1971). (The California ttorney General has held that newspapers do not aid or abet an nlawful employment practice by maintaining gender-designated

This governmental intrusion is not limited to the field of employment advertising. At the federal level and as interpreted by the courts, the Congress has

classified employment advertising headings. Attorney General Opinion No. 71/46); CONN. *Fair Employment Practice Act*, Conn. Gen. Stat. §§ 31-126(e),(f) (1961 Rev., 1969 Supp.); HAWAII *Fair Employment Practice Law*, Hawaii Rev. Stat. §§ 378-2(3), (6) (1968); IOWA. *Civil Rights Act*, Iowa Code Ann. §§ 601A.7.1.C, 601.8.1 (1973 Supp.). (The Iowa State Civil Rights Commission has notified forty-one Iowa newspapers to cease to use gender-designated column headings in their classified employment advertising sections. Lab. Rel. Rep. (FEP) 451:407 (1972)); KANSAS *Act Against Discrimination*, Kan. Stat. Ann. §§ 44-1009(e),(e) (1972); MASS. *Fair Employment Practice Act*, Mass. Ann. Laws Ch.151B, §§ 4(3), (5) (The Massachusetts Commission Against Discrimination adopted guidelines and regulations on January 21, 1971 which provide that the use of gender-designated headings is unlawful unless a notice similar to the one used by the Pittsburgh Press is prominently displayed on every classified advertising page. Lab. Rel. Rep. (FEP) 451:570K (1972)); MICH. *Fair Employment Practice Act*, Mich. Stat. Ann. §§ 17.4581 (3a) (d)(1), 17.4581(3)(g) (1968); MINN. *State Act Against Discrimination*, Minn. Stat. §§ 363.03(1)(4)(b),(1)(6)(2) (1971). (The Minnesota Department of Human Rights guidelines provide that the maintenance by newspapers of sexually separated help-wanted advertising is an unfair discriminatory practice Lab. Rel. Rep. (FEP) 451:650 (1972)); Mo. *Fair Employment Practices Act*, Mo. Rev. Stat. §§ 296.020(3),(5) (1969); N.H. *Law Against Discrimination*, N.H. Rev. Stat. Ann. §§ 354-A:8 (III, VI), (1955, 1972 Supp.); N.J. *Law Against Discrimination*, N.J. Stat. Ann. Tit. 10, Ch. 5. §§ 12(c), (e) (1972 Supp.); N.M. *Human Rights Act*, N.M. Stat. Ann. §§ 4-33-7-D, I(1) (1953, 1971 Supp.); N.Y. *Human Rights Law*, N.Y. Human Rights Law §§ 296-1(d), 6 (McKinney, 1972); ORE. *Fair Employment Practice Act*, Ore. Rev. Stat. §§ 659.030(3),(5)(1971); Pa. *Human Relations Act*, Pa. Stat. Ann. Tit. 28, §§ 955(b)(2),(e) (1964, 1972 Cum. Supp.); R.I. *Fair Employment Practices Act*, R.I. Gen. Laws §§ 28-5-7(D)(4), (F) (1956, 1972 Supp.); UTAH *Anti-Discrimination Act of 1965*, Utah Code Ann. §§ 34-5-b(d),(e) (1953 Rep. Vol. 4, 1971 Supp.); WASH. *Law Against Discrimination*, Wash. Rev. Code § 49.60.180 (4), § 49.60.220 (1972 Supp.); N.Y. CITY *Human Rights Law*, N.Y. City Admin. Code §§ B1-7.0(1)(d), 7.0(6) (1971).

sought to impose on newspapers the duty of screening real estate advertisements for their discriminatory impact under the provisions of the Civil Rights Act of 1968.[2] *See United States* v. *Hunter*, 324 F. Supp. 529 (D. Md. 1971), *aff'd*, 459 F.2d 205 (4th Cir. 1972), now pending in this Court as No. 72-146. In justifying this interpretation of the Civil Rights Act of 1968, the Fourth Circuit found that from the body of an advertisement, a newspaper could somehow "divine"[3] an advertiser's intent to discriminate in the field of real estate transaction. To ostensibly assist newspapers in divining an advertiser's discriminatory intent, the Department of Housing and Urban Development published certain interpretive "guidelines."[4] But, rather than curing the ambiguous standards to be applied by newspapers in divining discriminatory intent, these "guidelines" only serve to illustrate the monumental burdens thrust upon newspapers in making them the enforcement arms of the Civil Rights Division of the Justice Department.

These HUD "guidelines" create more problems for newspapers than they purport to solve. For example, words descriptive of dwellings,[5] catchwords,[6] symbols,[7] colloquialisms,[8] and even directions to the property[9]

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[2] 42 U.S.C. § 3604(c).

[3] *United States* v. *Hunter*, 459 F.2d at 213.

[4] 37 F.R. 6700 (April 1, 1972).

[5] Section A(1), Publication Guidelines for Compliance with Title VIII of the Civil Rights Act of 1968, 37 F.R. 6700, 6701.

[6] *Ibid.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

or descriptions of the location,[10] can be found on an after-the-fact basis to tend to indicate an intention to discriminate in the sales or rental of real estate. Yet, unless *Hunter* is reversed by this Court, newspapers must make such instantaneous judgments on possibly thousands of daily real estate advertisements at the peril of injunctive or other sanctions.

In connection with the advertising proscriptions of the Civil Rights Act of 1968, these screening burdens have been imposed on newspapers merely because it is easier for the Justice Department to proceed against a newspaper than against an advertiser. In fact, the Justice Department candidly admitted in *Hunter* that enforcement against each advertiser would be impractical. Therefore, the Department stated: "The logical option would be to build a dam at some strategic spot in the flow of publication, such as the newspaper office."[11] But certainly governmental convenience can never justify such drastic action.

Still another example of similar governmental intrusion is the Federal Election Campaign Act of 1971. In addition to regulating rates newspapers may charge for political advertising,[12] another section of that Act provides that no person may place a covered political advertisement in a newspaper without first certifying in writing to the newspaper that the spending limitations of the Act have been followed.[13] Without such a

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[10] *Id.*

[11] United States' Pre-Trial Memorandum, p. 12 filed 1/28/71, *United States* v. *Hunter*, Civil Action No. 70-816T, D. Md.

[12] Section 103(b), Federal Election Campaign Act of 1971, P.L. 92-225 92nd Cong. 2d Sess., 88 Stat. 3.

[13] Section 104(b), Federal Campaign Act of 1971, P.L. 92-225 92d Cong., 2d Sess., 88 Stat. 3.

rtification or written statement, a charge for the ivertising may be unenforceable and unlawful.[14] Un- r the regulations promulgated by the Comptroller eneral pursuant to the Act, a newspaper must pre- rve for two years such certificates together with an appropriate" notation showing use actually made by ch candidate, the dates used, and the charges made for ch advertising.[15] Furthermore, an even more vicious ovision of this Act requires newspapers at their peril make subjective decisions as to whether a political ivertisement is by or on behalf of any legally quali- d candidate for federal elective office (or for nomi- tion to such office).[16] If a newspaper wrongly de- des an advertiser's coverage, it can be subjected to iminal penalties.[17]

These statutes illustrate a dangerous proposition hich unfortunately has gained wide legislative accept- nce. By choosing newspapers as the most convenient ehicle for enforcement of what may otherwise be laud- tory remedial social legislation, Congress and various tate legislatures have overstepped the bounds of the irst and Fourteenth Amendments. Because of the vi- al Free Press and Due Process issues surrounding overnmental regulation of the editorial judgment ex- rcised by the press in classifying and publishing ad-

[14] See Sections 3.1 et seq. and 4.11 et seq., Rules and Regula- ons of the Comptroller General, 37 F.R. 6156, 6157, 6159 (March 4, 1972).

[15] Section 4.12(d), 37 F.R. 6159 (March 24, 1972).

[16] Section 4.11, 37 F.R. 6159 (March 24, 1972).

[17] Section 106, Federal Election Campaign Act of 1971, P.L. 2-225 92d Cong., 2d Sess., 88 Stat. 3.

vertising, this case is one of substantial national importance and major significance to all the press of this country.

To the knowledge of your amicus, this is the first action in which litigation has confronted the courts with the question of the legality of sex classification in the help-wanted advertising sections of newspapers.[18] For this reason, your amicus desires to present to this Court for its assistance, the views of the vast majority of its members in regard to the Constitutional validity of applying Section 8(j) of the Pittsburgh Human Relations Ordinance to newspapers.

## ARGUMENT

### A. APPLICATION OF SECTION 8(j) OF THE ORDINANCE TO NEWSPAPERS VIOLATES THE FIRST AMENDMENT.

#### I. The Ordinance

The Human Relations Ordinance No. 75 of the City of Pittsburgh, as amended by Ordinance No. 395, condemns as an unlawful employment practice the publi-

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[18] Two Federal cases have touched peripherally on this question. Neither has reached the merits of the issue involved in this appeal. *A.N.P.A.* v. *Alexander*, 294 F.Supp. 1100 (D.D.C. 1968) concentrated on both the statutory authority of the Equal Employment Opportunity Commission to promulgate "guidelines" purporting to be substantive regulations and the legal effect of such "guidelines." The former issue remains unresolved by that litigation. But, in connection with the latter issue, the Court held that such "guidelines" do not have the force and effect of law. *Brush* v. *San Francisco Newspaper Printing Co.*, 315 F.Supp. 577 (N.D. Calif. 1970), aff'd — F.2d — (9th Cir. 1972), involved the novel question of whether a newspaper, by publishing help-wanted advertising, was an "employment agency" within the meaning of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e). The Court in *Brush* had no difficulty in concluding that such activity did not make newspapers "employment agencies" either within the meaning of the Act or within the commonly understood meaning of the term.

cation of any advertisement which "indicates any discrimination because of . . . sex" [19] by a covered employer, employment agency, or labor organization. Section 8(j) of that Ordinance prohibits "any person" from aiding, inciting, compelling, coercing or participating in such an unlawful employment practice.[20]

For a violation of any provision of the ordinance or order of the Pittsburgh Commission on Human Relations, the local administrative body charged with the enforcement of the ordinance, "any person" shall be subject to a fine of not more than Three-Hundred

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[19] Section 8(e) of Ordinance No. 75 was enacted into law by the Council of the City of Pittsburgh on February 27, 1967 and provides:

> "It shall be an unlawful employment practice . . . for any 'employer', employment agency or labor organization to publish or circulate, or to cause to be published or circulated, any notice or advertisement relating to 'employment' . . . which indicates any discrimination because of race, color, religion, ancestry, national origin or place of birth."

Section 8(e) of Ordinance No. 75 was amended by sections 3 of Ordinance No. 395 which was enacted into law by the City Council on July 7, 1969 and which provides: "It shall be an unlawful employment practice . . . for any person to discriminate against any other person in the manner set forth in Sections 8 . . . of this Ordinance because of sex."

[20] Section 8(j) of Ordinance No. 75, as amended by Ordinance No. 395, provides: "It shall be an unlawful employment practice . . . for any person, whether or not an employer, employment agency or labor organization, to aid, incite, compel, coerce, or participate in the doing of any act declared to be an unlawful employment practice by this ordinance, or to obstruct or prevent any person from enforcing or complying with the provisions of this ordinance or any rule, regulation or order of the Commission, or to attempt directly or indirectly to commit any act declared by this ordinance to be an unlawful employment practice."

Dollars ($300.00), and in default thereof, to imprisonment of not more than ninety days.[21]

A person allegedly aggrieved by an unlawful employment practice may file a complaint with the Commission,[22] and if, after a public hearing [23] at which testimony and other evidence are taken,[24] the Commission determines that an unlawful employment practice has occurred, it "shall issue such order in writing as the facts warrant to effectuate the purposes of this ordinance." [25]

**2. The Administrative and Judicial Interpretations of the Ordinance Are to the Effect that It Controls the Exercise of a Newspaper's Editorial Judgment in Classifying Advertising**

Pursuant to this Ordinance and complaining that the maintenance of column headings designated "Jobs—Female Interest," "Jobs—Male Interest," and "Jobs—Male-Female" was a violation of the aiding and abetting prohibition of section 8(j) of the Ordinance, the National Organization for Women filed its charges against the Pittsburgh Press with the Pitts-

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[21] Section 15 of Ordinance No. 75, as amended by Ordinance No. 395, provides: "any person who shall violate any provision of this ordinance relating to unlawful practices, or any rule or regulation pertaining thereto adopted by the Commission or any order of the Commission, shall be subject to a fine of not more than Three-Hundred Dollars ($300.00) and in default of payment of the fine and costs, shall be subject to imprisonment for a period not exceeding ninety (90) days."

[22] Section 13(a) of Ordinance No. 75, as amended.

[23] Section 13(g) of Ordinance No. 75, as amended.

[24] Section 13(h) of Ordinance No. 75, as amended.

[25] Section 13(i) of Ordinance No. 75, as amended.

burgh Human Relations Commission on October 9, 1969 alleging:

> "The National Organization for Women charges the Pittsburgh Press with deliberate and constant violations of section 8(j) of the Human Relations Ordinance as amended by Ordinance 395. The National Organization for Women has attempted on several occasions to convince editors and publishers of The Pittsburgh Press that their policy of allowing employers to place advertisements in male or female columns, when the jobs advertised obviously do not have bona fide occupational qualifications or exceptions, is unlawful."

Finding that there was probable cause to believe that a discriminatory act occurred, the Commission ordered a public hearing which was conducted on January 15, 16, and February 12 and 26, 1970. Without any specific evidence that a covered entity violated the Ordinance by placing a help-wanted advertisement under a gender-designated column heading or that such a covered employer refused to hire an applicant solely on the basis of sex, the Commission ordered The Pittsburgh Press to cease and desist from the utilization of a help-wanted advertising classification system. In short, the Commission ordered the newspaper to change its format and arrangement of classified employment advertising. This Commission injunction was upheld on appeal by the Court of Common Pleas of Allegheny County, Pennsylvania,[26] and by the Commonwealth Court of Pennsylvania.[27] In sustaining the decision of the Commission in the lower Court requiring the Press

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[26] See Appendix, Petition of the Pittsburgh Press Co. for a Writ of Certiorari, p. 19a.

[27] 4 Pa. Cmwlth. 448, 287 A.2d 161 (1972).

to eliminate its classification system, the Commonwealth Court suggested:

> "What is of importance is that through the use of its arbitrarily selected column headings The Pittsburgh Press 'aids' such employers to discriminate. When the Pittsburgh Press arbitrarily arranges and publishes such column headings it is aiding in sex discrimination. The ruling that employment want ad column headings be written asexually is appropriate because it eliminates the difficulties of evaluating sophisticated medical, sociological, and actuarial theories of aggregate differences between the sexes. It is proper because it represents the highest degree of societal commitment to the ideal of legal sexual equality. Perhaps more importantly, asexual employment advertising column headings will aid in guaranteeing women their fundamental right to be hired and judged on the basis of individual characteristics and capabilities.[28]

From this administrative and judicial action, it should be clear that the conduct which has been questioned in this action involves newspaper activity that is subject to First Amendment protection. The system of gender classification of help-wanted advertising represents the exercise of editorial discretion, judgment, and prerogatives. Nevertheless, the Commission and the courts below justified this gross intrusion on the First Amendment rights by characterizing the activity sought to be regulated as "purely commercial" in nature and dogmatically followed the teaching of the totally unrelated case of *Valentine* v. *Christenson*, 316 U.S. 52 (1942). Were this problem viewed strictly

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[28] *Pittsburgh Press Co.* v. *The Pittsburgh Commission on Human Relations*, 4 Pa. Cmwlth. 448, 287 A.2d 161 (1972).

from the standpoint of an employer-advertiser, an employment advertisement might be properly characterized as representing "pure" commercial advertising and not entitled to First Amendment protection.[29] But this problem must be examined instead with the daily newspaper as a frame of reference.

Clearly, this characterization is superficial and incorrect for the doctrine, if it be that, of *Valentine* is inapplicable here because the decisions and activities of a publisher in arranging his newspaper format represent the exercise of fundamental and protected editorial discretion.

### 3. Arrangement of a Newspaper Format Represents Fundamental and Protected Editorial Judgment

This case raises questions relating to fundamental principles involved in newspaper publishing. When the First Amendment to the Constitution was adopted, it was known that in the existing context of newspaper publishing under the system of government being adopted by the people of our nation that the process enabling the distribution of information was a commercial process.

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[29] Some commentators have suggested that this doctrine, first enunciated in *Valentine*, which excises commercial advertising from any First Amendment protection has lost vitality. "The ruling was casual, almost offhand, and it has not survived reflection." *Commarano* v. *United States*, 358 U.S. 498, 514 (1958) (Douglas, J. concurring) Viewed from the standpoint of the recipient, informational rather than persuasional advertising conveys information to the consuming public as important as the information conveyed by political or editorial advertising. Hence, the value of the commercial-non-commercial dichotomy in determining the extent of First Amendment rights to be enjoyed by advertising may be mythical. *See, e.g., M. Redish, The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression, 39 Geo. Wash. L. Rev. 429 (1971).*

A newspaper is sold for a price to the public. In addition, its advertising is sold for a price to a segment of the public. Both transactions are commercial transactions in that sense. This in no way negates the primary consideration of the First Amendment in protecting the dissemination of information in the form of news, editorials, features, obituaries, marriage announcements, comic strips, television programs, classified ads, display ads, and the like under editorial prerogative within the format of the newspaper as a whole. The commercial side merely creates the economic structure supportive of this dissemination. Thus, under our system in this country, the First Amendment protection applies to the distribution of the protected information without regard to whether it is advertising information or otherwise. *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936); *Citizens Pub. Co.* v. *United States*, 394 U.S. 131 (1969).

The sweeping order of the Commission requiring elimination of the sexual classifications was justified by both the Commission and the court below by characterizing help-wanted advertising as a form of purely commercial advertising not entitled to First Amendment protection. But the lower courts in reaching this characterization viewed the problem involved herein from the wrong frame of reference. While this asserted distinction between commercial and non-commercial advertising may appear at first glance to have some basis in law vis-a-vis regulation of the advertiser, the efforts of the tribunals below to rest their action on this dichotomy overlook a fundamental point. The administrative action did not concentrate on the content of any employment advertisement. In fact, not one specific advertisement was discussed at either hearing. Instead, the Commission action sought to

condemn the newspaper's manner of advertising display. Throughout the administrative and court hearings below, the complainant and the City made it clear that they scored the Press' system of employment advertising. It was the euphemistic system on trial and not the proper application of the Ordinance to the "facts" adduced at the Commission hearing. With the hearings cast in this posture, it was no surprise that such fundamental points were overlooked.

In seeking to condemn the newspaper's manner of advertising display, the hearings invaded the area of editorial policy and judgment. Although few, if any, court decisions have sought to reach or even trace the outer limits of such judgment, it must be recognized that a newspaper's decision as to how advertising shall be displayed is as much an editorial function as its decision as to how its editorial page shall be constructed or what its editorial position shall be on a particular issue of the moment.

We recognize that to those outside the newspaper business, decisions surrounding advertising display may not appear as important as those surrounding other editorial functions. But even one outside the field of journalism would admit that whatever difference exists between the two is only a matter of degree. Both are editorial in nature; and infringement of what some may consider the lesser only provides a basis or precedent for a later infringement of the other. The police power is the power source of the Pittsburgh Ordinance, which has been interpreted below to forbid the newspaper from deciding its format. However, the City could not impose restraints on the type-size, the front or interior page layout of articles, the design or characteristics of the masthead or the use of color photographs. The reason that the City cannot

control such activities is that they are clearly editorial in nature and are protected by the First Amendment.

This point should not be considered an argument *ad terrorem*, for rights are eroded by slow, almost imperceptible steps, each one providing a precedent for the next. Quite apart from seeking to correct the underlying erroneous interpretation given to Section 8(j) by both bodies below, the press must be vigilant in preventing even the smallest step from being taken which would undermine a newspaper's right to make such editorial policy and related judgments.

#### 4. The First Amendment Protects Newspapers from the Type of Governmental Intrusion Attempted in This Case

While the general aims of social legislation to eliminate the last vestiges of unjustified discriminatory employment practices are to be applauded, still such legislation as the Ordinance under question can claim no "talismanic immunity" from the limitations of the First Amendment. *New York Times* v. *Sullivan*, 376 U.S. 254, 269 (1964). The examination of the application and the effect of application of section 8(j) of the Pittsburgh Ordinance to newspaper publishers must be made with the recognition that this particular kind of governmental intrusion on the press may be considered by many to be " 'the obnoxious thing in its mildest and least repulsive form . . .' but 'illegitimate and unconstitutional practices get their first footing in that way. . . . It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachment thereon." *Smith* v. *California*, 361 U.S. 147, 160 (1959) (Black, J. concurring), *citing Boyd* v. *United States*, 116 U.S. 616 (1885). The application of section 8(j) to news-

papers in publishing advertisements goes too far. Abridging a publisher's free exercise of judgment in his newspaper layout offends the free press clause of the First Amendment.

The publisher in this case is under an order of the Pittsburgh Human Relations Commission to classify help-wanted advertising without regard to whether a publisher may consider classification based on jobs of interest to males and females serves the best interests of the newspaper, its readers, and its advertisers. Thus, the publisher has been ordered by the Commission to rearrange his newspaper and classify advertising asexually on the pain of an *in futuro* determination that for whatever reason he erred on a particular advertisement. Moreover, the order questioned in this proceeding was entered on the basis that the mere act by the publisher of maintaining innocuous gender-designated column headings and classifying employment advertisements thereunder offended the Ordinance without regard to whether the publisher had any actual knowledge that a particular employer-advertiser was covered by the Ordinance or that such an advertiser intended to and did unjustifiably discriminate against applicants for a covered, advertised job on the basis of sex.

Such an order and such an interpretation of the Ordinance is in derogation of the First Amendment which exists so that a free and untrammeled press may live. As this Court noted in *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250 (1936):

> "The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have

> shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties. A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."

If, as here, the press can be regulated and penalized for the reasonable exercise of its editorial judgment in regard to layout format for advertising, there is no reason why it could not also be subjected to government regulation of other aspects of its editorial functions. No one would seriously contend that front-page design and layout or type-size or different labeling of news articles as fact or editorial or women's and men's sections or such similar things are the proper subjects for regulation. But that is not the point. Unless this Court reverses the decision herein, such functions of the press could be regulated if tomorrow some ingenious legislator couples the regulation with some otherwise laudable social goal. There is scant, if any, middle ground between what some may consider to be minor meddling involved in this case and full abridgment of the right. "[L]iberty of the press is in peril as soon as the government tries to compel what is to go into a

ewspaper." 2 Chafee, *Government and Mass Communication* 633 (1947).[30] Yet if this Pittsburgh Ordinance as interpreted stands in the face of this constitutional challenge, the city will have made the first step controlling the content of the press. For these asons, the ordinance must be declared unconstitunal under the First Amendment.

There is still another reason, however, why this ordince must fall. Not only does this ordinance abridge itorial prerogatives, but it goes beyond that and rces newspapers to screen and publish employment vertisements at their peril. This onus was justified the decisions below by characterizing the classifican of employment advertising as purely commercial nature. As stated hereinabove, this characterization mproper for the reason that the classification system indeed editorial rather than commercial in nature. wever, even if one were to accept the premise that he very least the classification process is a hybrid—t editorial and part commercial—it still follows t by forcing newspapers to screen advertising at r peril and in that screening process to make intaneous judgments on the discriminating impact housands of employment ads daily, the Ordinance nterpreted places an unconstitutional burden on the s.

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[30] *See also, Chicago Joint Board* v. *Chicago Tribune Co.* 307 pp. 422 (N.D. Ill. 1969), *aff d.*, 435 F.2d 470 (7th Cir. 1970), *denied*, 402 U.S. 973 (1971) where the District Court correcognized that: "[T]he function of the press from the the Constitution was written to the present time has never onceived as anything but a private enterprise, *free and indent of government control and supervision.* Rather than state and participation pervading the operation of the press, *the nedia and the government have had a history of disassocia-* (Emphasis added). 307 F.Supp. at 427.

Indeed, it was a similar burden placed on newspapers which justified the rationale of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). *New York Times* was amplified and extended in *Rosenbloom* v. *Metromedia*, 403 U.S. 29, 50 (1971) where the Court stated:

> "In libel cases, however, we view an erroneous verdict for the plaintiff as most serious. Not only does it mulct the defendant for an innocent misstatement—the three-quarter-million-dollar jury verdict in this case could rest on such an error—*but the possibility of such error*, even beyond the vagueness of the negligence standard itself, would create a strong impetus toward self-censorship, which the First Amendment cannot tolerate."

We do not suggest that after-the-fact controversies surrounding the discriminatory impact of employment advertising would expose a publisher to the extent of the exposure in *Metromedia*. The point involved, however, is not the extent of exposure but rather the exposure itself. On the pain of expending significant sums in defending a Commission action brought over the Ordinance as interpreted and on the further pain of being subjected to the existence of the contested order of the Commission, The Pittsburgh Press involuntarily is sought to be made a subagency of the Pittsburgh Human Relations Commission. We strongly urge that this cannot be countenanced by the First Amendment.

Moreover, the city treads in a delicate area in this case, for if it may, as its ordinance has been interpreted, through prior injunction, prevent the flow of information through advertisements, it may also prevent the flow of information through defendant's news stories or editorial policy. For example, in *United In-*

*terchange, Inc. of Mass.* v. *Harding*, 154 Me. 128, 145 A.2d 94 (1950), the petitioner published a magazine which specialized in advertising business and income-producing properties. The magazine also contained editorial comment and news items dealing with the real estate business generally. The State of Maine sought to bring the magazine within its law regulating real estate brokers and agents.[21] Thus being subject to the licensing requirements of the statute, the state sought to prevent further circulation of the magazine until its publishers became licensed real estate brokers. The court held the statute under which the state proceeded to be unconstitutional and noted that:

> "Since the advertising activities of the daily newspaper . . . differ from those of petitioners only in the fact that advertising accepted by the latter is restricted to the field of income producing real estate, the decision in the instant case is of vital concern to the whole press. The protection of the freedom of the press is intended primarily to safeguard the public in its right to the circulation of information . . . The evidence discloses that petitioners support by advertising sales, publish and circulate a magazine which contains information, opinion and advertising. We are not here concerned with any abuse of liberty. No one would seriously contend that the publication of advertisements for the sale of real estate is a proper subject for any 'previous restraint.' The press can be deprived of its liberty as quickly by previous rigid censorship. If by an artificial licensing device, the business of these petitioners can be curtailed or terminated, we see no obstacle to further

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[21] That statute defined those who were covered to include: "[A]ny person, firm, . . . [who] undertakes to promote the sale of real estate through the listing of such property in a publication . . ." 145 A.2d at 96.

encroachment on freedom of the press by restrictive legislative device aimed at specific media or even at the whole industry . . . We cannot sanction any breach in the wall of protection." [82] Id. at 99

As in *United Interchange*, the city here seeks to utilize Section 804(c) to define the business of accepting and publishing advertisements as something which it is not. A newspaper, by publishing employment advertising in no way participates in the employment business. If, however, the Ordinance were construed to cover newspapers, such construction could only be grounded on such erroneous theory. To do so, it is submitted, negates the freedom of the press and is invalid under the First Amendment.

In that regard, it is helpful to examine how the New York courts treated newspapers under the New York

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[82] Cases are legion which deny to Government the power to curtail by prior injunction or restrain the free flow of information or opinion. See, e.g., *New York Times Co.* v. *United States*, 403 U.S. 713, 29 L.ed. 2d 822 (1971) (publication of classified government documents); *Near* v. *Minnesota*, 283 U.S. 697 (1931) (injunction against alleged defamatory newspaper invalid); *Schneider* v. *New Jersey*, 308 U.S. 147 (1939) (ordinance requiring discretionary permit for canvassing invalid); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940) (ordinance requiring discretionary permit for religious or charitable solicitation invalid); *Hague* v. *C.I.O.*, 307 U.S. 496 (1939) (Ordinance requiring discretionary permit for public meeting invalid); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951) (prosecution for public meeting without discretionary permit invalid); *Saia* v. *New York*, 334 U.S. 558 (1948) (ordinance requiring discretionary permit for sound track invalid); *Kunz* v. *New York*, 340 U.S. 290 (1951) (prosecution for meeting without discretionary permit invalid). It is submitted that these cases are persuasive on the problem herein presented. It should be clear that whether a particular advertisement is discriminatory or indicates a preference is a matter of discretion and the resolution of the question depends largely on the viewer's (in this Case, the Government) outlook.

false advertising law.[33] In *Goldsmith* v. *Jewish Press Pub., Co.*, 118 Misc. 789, 195 N.Y.S. 37 (1922), the New York court was confronted by an injunction action instituted by the plaintiff who was a public accountant. The plaintiff sought to enjoin the defendant newspaper from publishing any advertisement containing the words "certified public accountant" or the initials "C.P.A." where the advertiser was not, in fact, a certified public accountant. The thrust of plaintiff's suit was that one holding himself out as a C.P.A. in an advertisement without possessing the certificate of a certified public accountant published a false advertisement which contravened the New York false advertising statute. In discussing the applicability of the false advertising statute to newspapers, the court correctly observed:

> "It is clear that the penal statute is directed against the advertiser, and *not the publisher of the newspaper*, who ordinarily can have no personal knowledge of the truth of the advertisements he publishes in his newspaper, and, unless he chooses to censor such advertisements himself, he is not required to do so by law." Id. at 37. (Emphasis added.)

In *Goldsmith*, the court's decision rested on the unstated premise that it would be unreasonably burdensome to require the newspaper publisher to sift from

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[33] Presently, the overwhelming majority of State Printers Ink statutes exempt newspapers from coverage. In the one or two that purportedly cover newspapers in publishing false advertising, coverage is limited only in the event that the newspaper publishes the contested advertisement with actual knowledge of its falsity. *See, generally, Note, Regulation of Advertising*, 56 Colum. L. Rev. 1018 (1956). The New York cases apparently involved a false advertising law which was silent on newspaper coverage.

its advertising pages those advertisements which were false or those which the publisher might conceivably think were false. Obviously such an onus placed on a newspaper would not only be unreasonable but, in the day-to-day operations of the newspaper, oppressive. There is little practical difference between the concept of false advertising and the concept of discriminatory advertisements.

Another New York case demonstrates this point. In *Amalgamated Furniture Factories, Inc.* v. *Rochester Times Union, Inc.*, 128 Misc. 673, 219 N.Y.S. 705 (1927), the plaintiff was an advertiser in defendant's newspaper. It brought suit against the newspaper because it refused to accept certain of plaintiff's advertisements. As a defense, the newspaper stated that the subject advertisements were false and misleading. In bolstering that defense, certain officers of the newspaper incorrectly testified that they would be subject to the New York false advertising law, apparently as an aider and abettor, if they accepted and published false advertising. The court flatly rejected that argument. Although the court held that the defendant could legally refuse to accept the advertisements, it did so on the basis of fundamental contracts law, and not on the basis of purported coverage by the statute:

> "Irrespective of the rate cards, the defendant was under no contract obligation to publish untrue statements in its advertising columns . . . This is not because, as one of the affiants seems to imply in his adffidavit on behalf of the defendant, that it would be a crime to publish such an advertisement. He quotes without labelling the source . . . a brief phrase that occurs in Section 421 of the penal law, relating to untrue and misleading advertisements. This statute does not brand the

newspaper as the misdemeanant, but rather the advertiser. The former, though, cannot be compelled to cooperate knowingly in the commission of a crime, however formally binding its contract obligations may appear to be. This is elemental in the law of contracts." 219 N.Y.S. at 707.

Like the rejected interpretation of the Maine statute in *United Interchange*, the application of Section 8(j) of the Pittsburgh Ordinance to newspapers would impose upon them requirements which are constitutionally appropriate only for the advertiser. If a newspaper can be held civilly or criminally liable, irrespective of its actual knowledge, for every advertisement which may be held to violate the law, not only will the efficiency of newspaper production be curtailed, but more importantly, its advertising revenue and its ability to disseminate information and ideas will be curtailed.

### B. APPLICATION OF THE ORDINANCE AS INTERPRETED VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Because Section 8(j) forbids persons from aiding or abetting the violation of the Ordinance, it is elementary that the complaint must at the minimum set out the act and the actor which were aided or abetted by respondent. Additionally, it is fundamental that the act alleged to be a violation of the Ordinance must indeed constitute an unlawful employment practice. This, in turn, requires an allegation that the principal allegedly aided by the Press was covered by the Ordinance.

It must be recognized that a violation of this Ordinance carries criminal penalties: Section 15 establishes a Three Hundred Dollar ($300) fine, or a period of

ninety (90) days imprisonment for a violation of either the Ordinance or a Commission rule, regulation or order. Clearly, then, a complaint charging an unlawful employment practice before the Commission must be tested by the standards applied to criminal charges or, at the very least, those applied in civil pleadings.[34]

A brief reading of the "particulars"[35] of the complaint reveals that its thrust is that The Pittsburgh Press did not agree with NOW's interpretation of Section 8(j) of the Ordinance. Certainly, disagreement with NOW's interpretation of Section 8(j) is not an unlawful employment practice within the meaning of any provision of Section 8 of the Ordinance.

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[34] The complaint filed by NOW fails to meet even the requirements of the Commission's regulations. Rule 2(c) (2) of the Commission's regulations requires that the complaint set forth the names and addresses of persons alleged to have committed the alleged unlawful employment practice. NOW only sets forth the name of the entity who was allegedly the aider or abettor. They did not specify who was aided or abetted. Further, the complainant failed to allege the particulars of the unlawful employment practice which was supposedly aided or abetted by The Pittsburgh Press. Such an allegation is a bare, minimum requirement of Rule 2(c) (4) of the said regulations, which provides that the complaint shall contain "the alleged unlawful discriminatory practice and a statement of the particulars thereof."

[35] Required by Commission Rule 2(c) (4). For Federal cases construing the admittedly liberal administrative pleading requirements of the non-criminal Civil Rights Act of 1964, see *Bowaters Southern Paper* v. *E.E.O.C.*, 304 F. Supp. 33 (E.D. Tenn. 1969) rev'd 428 F.2d 799 (6th Cr. 1970); *Graniteville Co.* v. *E.E.O.C.*, 3 F.E.P. Cases 155 (4th Cir. Feb. 27, 1971); *Adolph Coors Co.* v. *E.E.O.C.*, 3 F.E.P. Cases 62 (D. Colo., Jan. 30, 1971). See also, *Parnessa Realties, Inc.* v. *State Div. of Human Rights*, 317 N.Y.S. 2d 587 (1970).

Beyond this, NOW attempted to charge The Pittsburgh Press with aiding and abetting the perpetration of an unlawful employment practice. Nowhere in the complaint, however, is a specific unlawful employment practice alleged which was aided or abetted by The Press. It is elementary that one cannot aid or abet the commission of an unlawful act unless another commits the unlawful act. Accordingly, a complaint or charge must first allege with specificity, and not as a conclusion, the unlawful act which was supposedly aided or abetted. 21 Am. Jur. 2d, Criminal Law § 119 (1965); *State* v. *Derosia*, 94 N.H. 228, 50 A.2d 231; *United States* v. *Zerbst*, 111 F. Supp. 807 (E.D.S.C. 1953).

The bare allegation that The Press "allows" employers to place help-wanted advertising in "male" or "female" columns clearly fails to justify elementary principles of fairness and due process, and the Commission's own rules. If we assume for the purposes of this immediate discussion that Section 8(j) is valid in its purported application to newspapers in publishing, under sex designated columns, otherwise nondiscriminatory employement advertising, a complainant must allege and prove four points to impose liability on a newspaper. First, he must allege and prove that an employer covered by the Ordinance placed an employment advertisement under a particular sex designated column heading. Second, he must allege and prove that the mere placement of an otherwise nondiscriminatory employment advertisement under a sex designated column heading renders such advertisement discriminatory. Third, he must allege and prove that the job position advertised was not subject to a bona fide occupational exemption based on sex. Finally, he must

allege and prove that the newspaper accepted and published the advertisement knowing that the advertiser was covered by the Ordinance and knowing that the position had no bona fide occupational exemption based on sex. Without such specific allegation, the complaint must fail.

It should be obvious that the complaint does not meet the fundamental tests of fairness in that it was so vague that The Press was not formally apprised of the offense which it was alleged to have committed. For example, in *Cole* v. *Arkansas*, 333 U.S. 196 (1948), in considering the validity of an Arkansas indictment, this Court examined the principles of procedural due process, an element of which is that one be apprised of the offense he allegedly committed:

> "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge . . . are among the constitutional rights of every accused in a criminal proceeding, state or federal." (Emphasis added). *Id.* at 301.

It is the amazing position of the Commission, sustained by the lower courts, that whatever vagueness which may have existed in the complaint was cured by preliminary, informal meetings between The Press and the Commission. It is a fundamental principle that defective pleadings may be cured through leave of court to file a formal amendment or, on appeal, an amendment to conform pleadings to proof may be treated as made if it is such as will cause no injustice to the adverse party. *Simms* v. *Andrews*, 118 F.2d 803

(10th Cir. 1941). However, it is equally well established that:

> "the doctrine of implied amendments to make a complaint correspond with the proof cannot obtain if the proof does not establish a cause of action." 41 Am. Jur. *Pleadings* § 310 (1961)[36]

Notwithstanding the lack of proper amendment of the complaint so that The Press could be apprised of the charge brought against it, the Court below concluded, without any supporting evidence in the record whatsover, that as a result of pre-hearing proceedings and a recess between hearing sessions, "certain things should have been obvious" to The Press. Thus, the Court below indulges in speculation as to what might have been said at the pre-hearing proceedings and might have been learned by The Press during the hiatus in the public hearings. Such speculation cannot become the basis for the amendment of a defective charge, particularly when there is not a scintilla of evidence within the record that the defect was cured.

Even if we were to assume, *arguendo*, that fundamental defects in a complaint can be cured by evidence at the public hearing, it is clear that not one missing element discussed above was supplied by any testimony. Not one witness testified that a specific advertisement was placed by a specific covered employer. Nor did any witness testify that a particular job advertised possessed no bona fide occupational qualification based on sex. Moreover, there was not the slightest hint that any proscribed advertisement was ac-

[36] See also, *Nicholson* v. *Nicholson*, 67 Mont. 517, 216 P. 328, 31 A.L.R. 548 (1923).

cepted by The Press with knowledge that the advertiser was covered by the Ordinance or that the position advertised carried no bona fide occupational qualification. Indeed, not one witness testified that he sought employment from a covered employer and was denied employment solely on the ground of sex. In the present posture of this case, the complaint remains unamended and defective and it does not specify a charge against The Press under the provisions of the Ordinance. As Judge Mencer noted in his dissenting opinion:

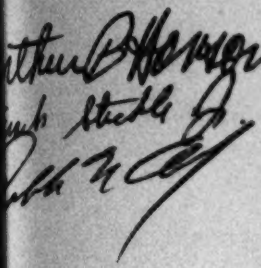
> "The complaint does not allege any violation by anyone else. It is simply impossible for the appellant to be guilty aiding another in the violation of the Ordinance. When no violation was even alleged and in fact, no attempt was made to prove such violation, it is fundamental that one cannot aid that which did not occur. I must conclude that Due Process clearly requires that, without alleging or proving a violation of the Ordinance by an employer who was aided by appellant, the complaint is invalid on its face; and it should be dismissed." (287 A.2d at 176)

### C. CONCLUSION

This case presents to this Court for the first time important questions relating to the extent of First Amendment protection of editorial functions of the press. In the context of the proliferation of legislation directed at making the press the main bulwark in the enforcement of otherwise laudable social legislation, this Court must rule that the exercise of editorial judgment is protected by the First Amendment, regardless of whether that judgment is directed at news presentation or expressions of editorial opinion in the traditional and well-accepted meaning of those terms. For

these reasons and for the reason that the Pittsburgh Press was clearly denied due process by the actions of the courts below and the Commission, this Court should reverse the judgment of the Commonwealth Court of Pennsylvania.

Respectfully submitted,



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IN THE

# Supreme Court of the United States

October Term, 1972
No. 72-419

PITTSBURGH PRESS COMPANY, *Petitioners,*

*vs.*

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS and THE CITY OF PITTSBURGH,

and

THE NATIONAL ORGANIZATION FOR WOMEN, INC., *Respondents.*

**Brief on Behalf of the California Fair Employment Practice Commission by the Attorney General of the State of California as Amicus Curiae in Support of Respondents Pittsburgh Commission on Human Relations, et al.**

## Jurisdictional Statement

There is in the state government of California, in the Human Relations Agency, the Department of Industrial Relations. Within that Department is the Division of Fair Employment Practices, which includes the State Fair Employment Practice Commission.[1] (Cal. Labor Code §§ 50, 56, 1414.)

This amicus curiae brief is respectfully submitted on behalf of the California FEPC, by and through the California Attorney General pursuant to Rule 42(4) of this Honorable Supreme Court of the United States.

[1]Hereafter referred to as California FEPC.

## Preliminary Statement

Amicus curiae files this brief urging that the January 27, 1972 Order and Decision of the Commonwealth Court of Pennsylvania be affirmed.

## Interest of Amicus Curiae

The California Fair Employment Practice Act (Cal. Labor Code §§ 1410-1433) defines unlawful employment practices as prohibiting discrimination in employment based on sex, as well as race, religion, color, national origin, or ancestry. The California FEPC is empowered to prevent discrimination in employment and in this capacity determines whether an unlawful employment practice has been committed based upon the California Fair Employment Practice Act. Section 1420 of the Fair Employment Practice Act reads as follows:

> "1420. It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:
>
> ". . . .
>
> "(d) For any employer or employment agency to print or circulate or cause to be printed or circulated any publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification or discrimination."

Section 1420, subdivision (f) also provides that it shall be an unlawful practice:

> "(f) For any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so."

The State of California has declared and recognized that "the practice of denying employment opportunity and discriminating in the terms of employment on account of race, religion, creed, color, national origin, ancestry or sex, foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advance, and substantially and adversely affects the interests of employees, employers, and the public in general." Cal. Labor Code § 1411. It is the opinion of the California FEPC that segregation of advertisements by sex is discrimination and denial of employment opportunity within the meaning of the express law of the State of California.

The scope of the above statutory scheme as it relates specifically to newspapers, was interpreted by the California Attorney General in Opinion Number 71-46 dated January 21, 1972.[2]

The California statutes are substantially similar to the Pittsburgh ordinance under attack here. Therefore, a decision affirming the lower court is of great importance to the continued enforcement of the California Fair Employment Practice Act.

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[2]A discussion of the Opinion appears below, and a copy is attached as Exhibit A.

## ARGUMENT

### I

### The Law of the State of Californin Is That Under Certain Circumstances a Newspaper Does "Aid or Abet" in Unlawful Employment Practices by Maintaining Help Wanted Ads in Columns Segregated by Sex

In the amicus curiae brief submitted by the American Newspaper Publishers Association, footnote (1) reads, "The California Attorney General has held that newspapers do not aid or abet an unlawful employment practice by maintaining gender-designated classified employment advertising headings. Attorney General Opinion No. 71/46." The use of this opinion in support of the American Newspaper Publishers Association's position misconstrues the result reached by quoting merely a portion of the actual opinion.

In fact, the opinion concluded:

> ". . . that in order to aid or abet in the doing of acts forbidden by section 1420, subdivision (d) of the Fair Employment Practice Act, the newspaper must do some act to assist, aid or promote the unlawful discrimination by the employer or employment agency with knowledge of the unlawfulness of the discrimination. Therefore, a newspaper does not aid or abet in the doing of acts forbidden by section 1420, subdivision (d) of the Fair Employment Practice Act merely by printing 'help wanted ads' in columns segregated by sex.
>
> "However, a newspaper is a person within the meaning of section 1420, subdivision (f) of the Fair Employment Practice Act and therefore, by

printing help wanted ads in columns segregated by sex where the newspaper has knowledge that there is no bona fide occupational qualification for the jobs listed aids or abets in the doing of acts forbidden by section 1420, subdivision (d) of the Fair Employment Practice Act.

"Moreover, under some circumstances, where such segregation is not requested by the employer or the employment agency, the conduct of a newspaper in suggesting or insisting upon such segregation may constitute incitement or coercion in violation of section 1420, subdivision (d).

"The question of whether a newspaper has knowingly aided, abetted, incited or coerced an employer or employment agency in the doing of acts forbidden by section 1420, subdivision (d) of the Fair Employment Practice Act will be a question of fact which may be determined on circumstantial evidence."

The construction of the statute as requiring "knowledge" was based on the unique wording and requirements of the California statute. Although the statutes are similar, the interpretation of the California statute is not relevant to an interpretation of the Pittsburgh Ordinance involved herein.

The Pittsburgh ordinance is distinguishable from the California enactment, encompassing within its terms any person who would ". . . aid, incite, compel, coerce or participate in the doing of any act declared to be an unlawful employment practice." The breadth of this wording is inclusive of conduct that might not be within the purview of the California law. Further, the instant matter contains a finding of fact, certainly sup-

ported by substantial evidence, that the newspapers did, in fact, participate in the doing of acts made unlawful in Pittsburgh.

In reliance upon the Opinion by the Attorney General the California FEPC has contacted all publishers of newspapers within the State of California. Although at this time not every newspaper within the State has complied with the California law, major newspapers which have eliminated segregated help wanted column headings include: Los Angeles Times, San Francisco Chronicle, San Francisco Examiner, Oakland Tribune, Sacramento Bee, Fresno Bee, Modesto Bee, Sacramento Union, Santa Monica Evening Outlook, and the Santa Barbara News Press.

## II

## Amicus Curiae Supports the Contention That the Pittsburgh Ordinance Is Properly Designed to Eliminate a Recognized Discriminatory Practice

The California FEPC supports the decision of the Commonwealth Court of Pennsylvania, and the contentions of respondents. Respondents have presented ample legal and factual support to sustain the constitutionality of the ordinance, and further discussion of these matters would be merely repetitive.

We would, however, point out to the court that California, as well as numerous other states are gravely concerned over the proliferation of practices, which freeze the *status quo*, the end product of which is discrimination.

The states have been emphatic in the campaign against sex discrimination in the area of advertising by making it unlawful for a newspaper to maintain employment columns segregated on the basis of sex.

The Iowa Civil Rights Commission recognized the crucial role newspaper advertising can play in discriminatory hiring practices by employers and employment agencies and apparently to eliminate all temptation of any discriminatory practices in advertising, adopted the following guidelines:

"Section 1.1(105A). Cease Use—1.1(1) All newspapers within the State of Iowa shall cease to use sex-segregated want ads—e.g. 'Male Help Wanted', 'Female Help Wanted', and 'Male and Female Help Wanted' or 'Men—Jobs of Interest', 'Women—Jobs of Interest', and 'Men and Women'.

'1.1(2) Any newspapers failing to comply with subrule 1.1(1) shall be deemed in violation of the Iowa Civil Rights Act, sections 105A.7 and 105A.8 and legal proceedings shall henceforth be initiated against such newspaper.

"1.1(3) The Iowa Civil Rights Commission will regard any publication of sex preference for a job to be in violation of the Iowa Civil Rights Act and, therefore suggests that all Iowa newspapers refrain from publishing any sex preference which an employer in its job order may want printed."

(Guidelines adopted by the Iowa Civil Rights Commission pursuant to Sec. 105A.5(9) of Iowa Civil Rights Act, CCH ¶ 22,875.)

Likewise Massachusetts took an unequivocal stand:

"The maintenance of newspapers and other publishers of help-wanted classified columns segregated by sex is unlawful. Such columns act to

aid and abet, or attempt to aid and abet, advertisers in violation of Chapter 151B."

(Guidelines and Regulations adopted by the Massachusetts Commission Against Discrimination pursuant to Chapter 151B § 4 and § 5 of Massachusetts General Laws, CCH ¶24,051.)

There are other states with similar prohibitions against sex segregated employment columns. And cities, such as New York, have adopted ordinances that have caused newspapers to desegregate their employment advertising, while other newspapers, such as *The Christian Science Monitor* and *Newsday* have voluntarily integrated their "Male and "Female" columns.

All these actions were taken in recognition of the fact that publishing advertisements in columns segregated on the basis of sex is discriminatory.

The Citizen's Advisory Council of the Status of Women issued a Memorandum to the Equal Employment Opportunity Commission in October 1965 and in it they mentioned some of the difficulties:

"Separate 'help-wanted men' and 'help-wanted women' columns in newspapers serve only to advise job applicants not to apply where they are not wanted, thus perpetuating discrimination. Moreover, sex-segregated newspaper columns actually encourage employers to place a sex label on jobs, which unintentionally, restricts the employment opportunities of both men and women."

(See 112 Cong. Rec. 13692, June 20, 1966.)

Congresswoman Martha Griffiths of Wisconsin in a speech before the United States House of Representatives (112 Cong. Rec. 13689, June 20, 1966) stated that she was "convinced that advertising in columns headed by sex . . . is most pernicious because it reinforces prejudicial attitudes limiting women to the less rewarded and less rewarding types of work".

The Special Subcommittee on Education of the House of Representatives entered into the record of July 1, 1970, during hearings on discrimination against women, two opinions bearing on this problem. Gerald H. F. Gardner in his article "Want-Ads Tomorrow: Neutral With Respect to Sex," compares the sex discriminatory advertisements of today with the race discriminatory advertisements of the past:

> "The present format of want-ads is a relic from times when people were less sensitive to injustice. There used to be categories labelled 'Colored-Male' and 'Colored-Female'. When these were made illegal, and then became offensive to the public, the newspapers merely dropped the categories. But the principle remained. Jobs continued to be categorized according to the social standing and caste of the reader. The reader is expected to say 'I am female, therefore I need to scan only Female sections'—just as in the old days a colored person was expected to say 'I am black, therefore I need only scan the colored sections.' "
>
> (Hearing Before the Special Subcommittee on Education of the Committee on Education and Labor, House of Representatives, Ninety-First Congress, Second Session on Section 805 of H.R. 16098, Part 2, p. 894.)

Also entered into the record was the testimony of Sandra L. Bem and Daryl J. Bem, Department of Psychology, Carnegie-Mellon University, when they appeared before the Pittsburgh Human Relations Commission in February 1970. Their empirical studies showed that classification of jobs under sex-segregated headings markedly discouraged women from considering those jobs classified as "Male Interest." In their testimony they stated that an employer who wishes to hire only males

> "can place his ad in the 'Male Interest' column, secure in the knowledge that this will effectively discourage female applicants. It is in this way that sex-segregated want ads can 'aid and abet' discrimination in employment on the basis of sex". (Hearings before the Special Subcommittee on Education, *supra*, p. 891.)

Clearly then, from all this information, both empirical and intuitive, the publication of employment advertising in columns segregated on the basis of sex is discriminatory. Common sense says publicizing employment advertising in columns segregated on the basis of sex is a blatant attempt to undermine the true purpose of anti-sex discrimination legislation.

## Conclusion

This case presents to the court a matter of considerable interest to numerous states, local and federal agencies, and private individuals who are committed to the elimination of discrimination in all forms. For the above reasons, and those set forth by respondents, it is respectfully requested that the judgment of the Commonwealth Court of Pennsylvania be affirmed.

Respectfully submitted,

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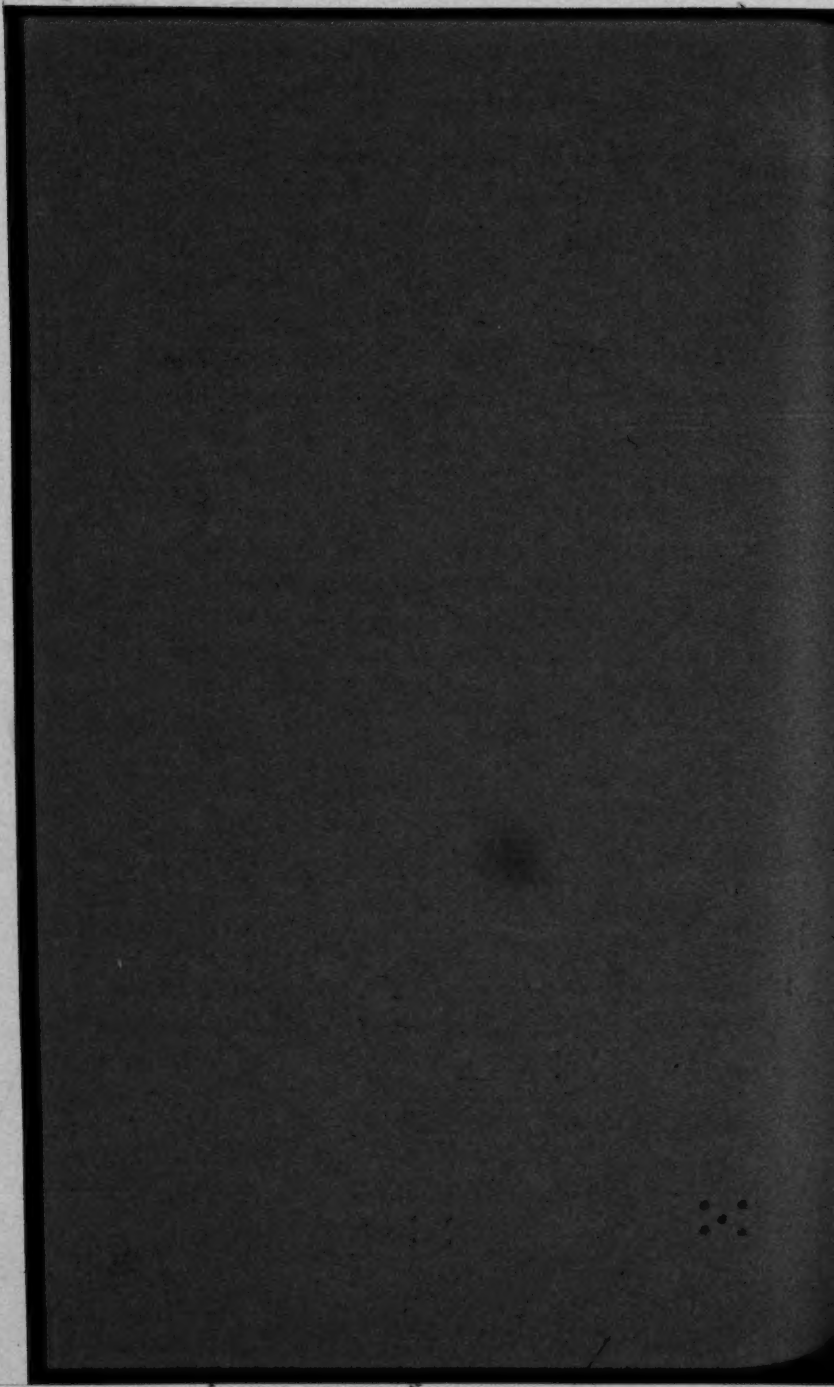


## EXHIBIT "A."

### Opinion of the Attorney General.

Opinion No. 71-46—January 21, 1972

SUBJECT: PRINTING BY NEWSPAPERS OF "HELP WANTED ADS" IN COLUMNS SEGREGATED BY SEX—A newspaper does not aid or abet in the doing of acts forbidden by the Fair Employment Practice Act by merely printing "help wanted ads" in columns segregated by sex; a newspaper must do some act to assist, aid, or promote the unlawful discrimination by the employer or employment agency with knowledge of the unlawfulness of the discrimination; the question of whether a newspaper has violated provisions of the Fair Employment Practice Act will be a question of fact which may be determined on circumstantial evidence.

Requested by: DIRECTOR, DEPARTMENT OF INDUSTRIAL RELATIONS

Opinion by: EVELLE J. YOUNGER, Attorney General

Andrea Sheridan Ordin, Deputy

William C. Hern, Director of the Department of Industrial Relations, has requested an opinion on the following question:

When a newspaper prints "help wanted ads" in columns segregated by sex, does the newspaper aid or abet in the doing of acts forbidden by section 1420, subdivision (d) of the Fair Employment Practice Act? (Labor Code §§ 1410 et seq.)

The conclusion is:

In order to aid or abet in the doing of acts forbidden by section 1420, subdivision (d) of the Fair Employment Practice Act, the newspaper must do some act to assist, aid, or promote the unlawful discrimination by the employer or employment agency with knowledge of the unlawfulness of the discrimination. Therefore, a newspaper does not aid or abet in the doing of acts forbidden by section 1420, subdivision (d) of the Fair Employment Practice Act merely by printing "help wanted ads" in columns segregated by sex.

However, a newspaper is a person within the meaning of section 1420, subdivision (f) of the Fair Employment Practice Act and therefore, by printing help wanted ads in columns segregated by sex where the newspaper has knowledge that there is no bona fide occupational qualification for the jobs listed aids or abets in the doing of acts forbidden by section 1420, subdivision (d) of the Fair Employment Practice Act.

Moreover, under some circumstances, where such segregation is not requested by the employer or the employment agency, the conduct of a newspaper in suggesting or insisting upon such segregation may constitute incitement or coercion in violation of section 1420, subdivision (f).

The question of whether a newspaper has knowingly aided, abetted, incited, or coerced an employer or employment agency in the doing of acts forbidden by section 1420, subdivision (d) of the Fair Employment Practice Act will be a question of fact which may be determined on circumstantial evidence.

## ANALYSIS

The Fair Employment Practice Act (Labor Code sections 1410-1433) since its amendment in 1970 prohibits discrimination in employment based on sex, as well as race, religious creed, color, national origin, or ancestry.

Section 1420, subdivision (d) of the Fair Employment Practice Act, as amended, reads as follows:

> "1420. It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:
>
> ". . . .
>
> "(d) For any employer or employment agency to print or circulate or cause to be printed or circulated any publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification or discrimination as to race, religious creed, color, national origin, ancestry, or sex or any intent to make any such limitation, specification or discrimination."

Section 1420, subdivision (f) also provides that it shall be an unlawful practice:

> "(f) For any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so."

There is little question that when an employer or an employment agency submits a help wanted ad to a newspaper under a classification segregated by sex, the

employer or employment agency causes to be printed a publication which "expresses, directly or indirectly," a limitation as to sex. Such a limitation is directly forbidden by the language of section 1420, subdivision (d) of the Fair Employment Practice Act unless based upon a bona fide occupational qualification or where based upon applicable security regulations.

Although no cases in California specifically construe the scope of the bona fide occupational qualification exception of the Fair Employment Practice Act when applied to sex discrimination, the Equal Opportunity Commission Guidelines on Discrimination Because of Sex state that the bona fide occupational qualification exception in the Federal Act, 42 U.S.C. 2000e-3(b) "should be interpreted narrowly." 29 C.F.R. § 1604 (1971).

In pertinent part, the Guidelines promulgated by the Commission read:

"....

"(1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:

"....

"(ii) The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship. The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.

"(iii) The refusal to hire an individual because of the preferences of co-workers, the employer, clients or customers except as covered specifically in subparagraph (2) of this paragraph.

". . . .

"(2) Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, *e.g., an actor or actress.*" 29 C.F.R. § 1604.1 (1971).

*See, also, Sail'er Inn v. Kirby,* 5 Cal. 3d 1, 14-15 (1971); *Rosenfeld v. Southern Pacific Company,* 444 F.2d 1219, 1224-1225 (9th Cir. 1971); *Diaz v. Pan Am. World Airway, Inc.,* 442 F.2d 385 (5th Cir. 1971), *cert. denied,* .... U.S. ...., 40 U.S.L.W. 3212 (Nov. 9, 1971); *Weeks v. Southern Bell Telephone & Telegraph Co.,* 408 F.2d 228 (5th Cir. 1969).

We believe that the Guidelines and the interpretation of the above cases will control the interpretation of the equivalent bona fide occupational qualification language in the California statute. It therefore follows that the bona fide occupational qualification provision in the Fair Employment Practice Act, like the provision in the federal statute, will be narrowly construed so that it will be unlawful in practically all cases for employers and employment agencies to cause to be printed any advertisement expressing a limitation as to sex.

Of course, a finding that employers and employment agencies cause to be printed any advertisement which expresses a limitation as to sex where there is no bona fide occupational qualification violates section 1420, subdivision (d), does not answer our inquiry here.

Section 1420, subdivision (d) by its terms is limited to employers and employment agencies. In our opinion, a newspaper, when acting in its capacity of accepting advertising for its classified section, is neither an employer or employment agency within the meaning of section 1420, subdivision (d). *See Brush v. San Francisco Newspaper Printing Company*, 315 F. Supp. 577 (N.D. Cal. 1970).

However the prohibitions of section 1420(f) are not limited to any specifically named entities, but are applicable to all "persons." Section 1413 of the Labor Code defines person to include:

> "(a) 'Person' includes one or more individuals, partnerships, associations or corporations, legal representatives, trustees, trustees in bankruptcy, or receivers."

Therefore a newspaper, whether a partnership, corporation or one or more individuals, is a person within the meaning of section 1420, subdivision (f) and is capable of aiding, abetting, inciting, compelling or coercing the doing of acts forbidden by this statute.

The terms "aid" or "abet" have not been defined in context of the Fair Employment Practice Act. However, there is substantial law defining those terms in California as used in Penal Code section 31. Penal Code section 31 reads in relevant part:

> "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid *and* abet in its commission . . . are principals in any crime so committed." (Emphasis added.)

It should be noted that the Labor Code section 1420, subdivision (f) being construed here, unlike Penal Code section 31 set out above, is not drafted in the conjunctive. Labor Code section 1420, subdivision (f) makes it an unlawful practice for any person to aid, abet, incite, compel, *or* coerce the doing of any of the acts forbidden under this part. In drafting the statute in the disjunctive, it can be argued that it was the intent of the Legislature to draw a distinction between the terms used and to set forth alternative grounds for liability. Such construction of the statute would be consonant with the traditional rules of statutory construction of disjunctive or conjunctive words. *See*, Sutherland, Statutory Construction, § 4923 (3rd Ed. 1963). As noted in *Houge v. Ford*, 44 Cal. 2d 706, 712 (1955), in its ordinary sense the function of the word "or" is to mark an alternative such as "either this or that." The unnatural construction of "or" as "and" is sanctioned only when such construction is found necessary to carry out the obvious intent of the Legislature where such intent may be gleaned from the context in which the word is used. *See also, People v. Smith*, 44 Cal. 2d 77 (1955); *Consolidated Rock etc. Co. v. State of Cal.*, 57 Cal. App. 2d 959 (1943).

Such a conclusion also could be supported by the fact that the terms "aid" and "abet," at least in California, have long had different meanings. The word "aid" standing alone does not imply guilty knowledge of felonious intent, *People v. Dole*, 122 Cal. 486, 492 (1898); *People v. Etie*, 119 Cal. App. 2d 23, 28 (1953); whereas abet is defined to mean "*knowingly* and with criminal intent promote, encourage or instigate, by act or counsel, or by both . . . ." (Emphasis added.) *People v. Ellhamer*, 199 Cal. App. 2d 777,

781 (1962). The term "incite" according to *Piluso v. Spencer*, 36 Cal. App. 416, 421 (1918), "carries with it the idea of *encouragement*, persuasion, and inducement. . . ." (Emphasis added.)

However, we believe without a more explicit expression of legislative intent, that the more persuasive argument is that section 1420, subdivision (f) was intended to be construed as is Penal Code section 31. Therefore we conclude that a person cannot violate the aiding or abetting provision of section 1420, subdivision (f) unless he has knowledge of the unlawfulness of the act.

Whether or not the requisite elements of aiding or abetting a violation of section 1420, subdivision (d) of the Fair Employment Practice Act exist in a given case ordinarily will be a question of fact which may be determined upon circumstantial evidence. *People v. Herrera*, 6 Cal. App. 3d 846, 852 (1970); *People v. Fleming*, 191 Cal. App. 2d 163, 168-169 (1961).

The Court of Common Pleas in Pennsylvania in *Appeal of the Pittsburgh Press Co.*, 3 E.P.D. ¶ 8154 (1970), also decided that a newspaper could aid or abet in the violation of a municipal ordinance which read that it was unlawful:

> ". . . .
>
> "(e) For any employer, employment agency or labor organization to publish or circulate, or to cause to be published or circulated, any notice or advertisement relating to employment or membership which indicates any discrimination because of race, color, religion, ancestry, national origin or place of birth or sex."

The ordinance also is drafted with the following prohibition against any person aiding or abetting in an unlawful employment practice:

> "(j) For any person, whether or not an employer, employment agency or labor organization, to aid, incite, compel, coerce or participate in the doing of any act declared to be an unlawful employment practice by this ordinance, or to obstruct or prevent any person from enforcing or complying with the provisions of this ordinance or any rule, regulation or order of the Commission, or any attempt directly or indirectly to commit any act declared by this ordinance to be an unlawful employment practice."

The municipal ordinance like the sections here referred to contains an exception that the covered entity may discriminate on the basis of sex if sex is a "bona fide occupational qualification."

In that case the Court upheld the adjudication of the Commission on Human Relations of the City of Pittsburgh that newspapers which printed help wanted columns which were segregated by sex and read "Male Help Wanted," "Female Help Wanted," and later were charged to read "Jobs—Male Interest," "Jobs—Female Interest," and "Male-Female" aided the unlawful employment practices of an employer, employment agency or labor organization.

In the one case which might be thought to contain support for a position contrary to our conclusion, *Brush v. San Francisco Newspaper Printing Company*, *supra*, 315 F. Supp. 577, the court construed Title VII, 42 U.S.C. section 2000e-3(b), making it unlawful for an employer, labor organization, or employment agency

to print any advertisement which indicates a preference, limitation, specification, or discrimination based upon sex unless based upon a bona fide occupational qualification. The court found that newspapers running help wanted columns segregated by sex did not violate that section since newspapers were not specifically enumerated entities in the statute.

However, the federal statutory scheme, unlike the Fair Employment Practice Act here does not include a provision making it unlawful to aid or abet in the unlawful employment practice described in 42 U.S.C. section 2000e-3(b). The court therefore did not reach the question posed here.

The conclusion that a newspaper through the placing of ads in columns segregated by sex where there is no bona fide occupational qualification may aid or abet, or in cases where such segregation is not requested by the employer or employment agency may incite or coerce employers and employment agencies in the doing of acts forbidden by section 1420, subdivision (d) of the Fair Employment Practice Act does not conflict with the mandates of the First and Fourteenth Amendments of the Federal Constitution that there shall be no laws abridging the freedom of speech or of the press.

It has long been recognized that valid legislation may be enacted to regulate the commercial aspects of speech whether the mode of communication is a magazine, handbill, radio broadcast, or poster on a bus. *See Breard v. Alexandria*, 341 U.S. 622, 71 S. Ct. 920, 95 L. Ed. 1233 (1951); *Valentine v. Chrestensen*, 316 U.S. 52, 62 S. Ct. 920, 86 L. Ed. 1262 (1942); *New York State Broadcasters Ass'n, Inc. v.*

*United States*, 414 F.2d 990 (2nd Cir. 1969), *cert. denied* 396 U.S. 1061, 90 S. Ct. 752, 24 L. Ed. 2d 755 (1970); *Wirta v. Alameda-Contra Costa Transit Dist.*, 68 Cal. 2d 51, 57 (1967).

The courts have consistently noted the difference between the regulation of advertising content and the editorial and news content of a newspaper. Most recently in *United States v. Hunter*, 324 F. Supp. 529 (D.Md. 1971) the court again noted the difference when it decided that an injunction against violation of subsection (c) of section 3604 of the "Fair Housing" provisions of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601, et seq., would lie against a newspaper publishing advertisements which violate the anti-discrimination provision of said subsection in the proper case and that such an injunction would not constitute an unconstitutional previous restraint on freedom of press.

The court stated:

> "The restrictions in § 3604(d) limit speech only in a commercial context, not in relation to the dissemination of ideas. The Supreme Court and other courts have ruled that commercial activities are not entitled to the same First Amendment protections that are afforded to the expression of racial, religious or political views. [Citations.]" *United States v. Hunter, supra* at 533.

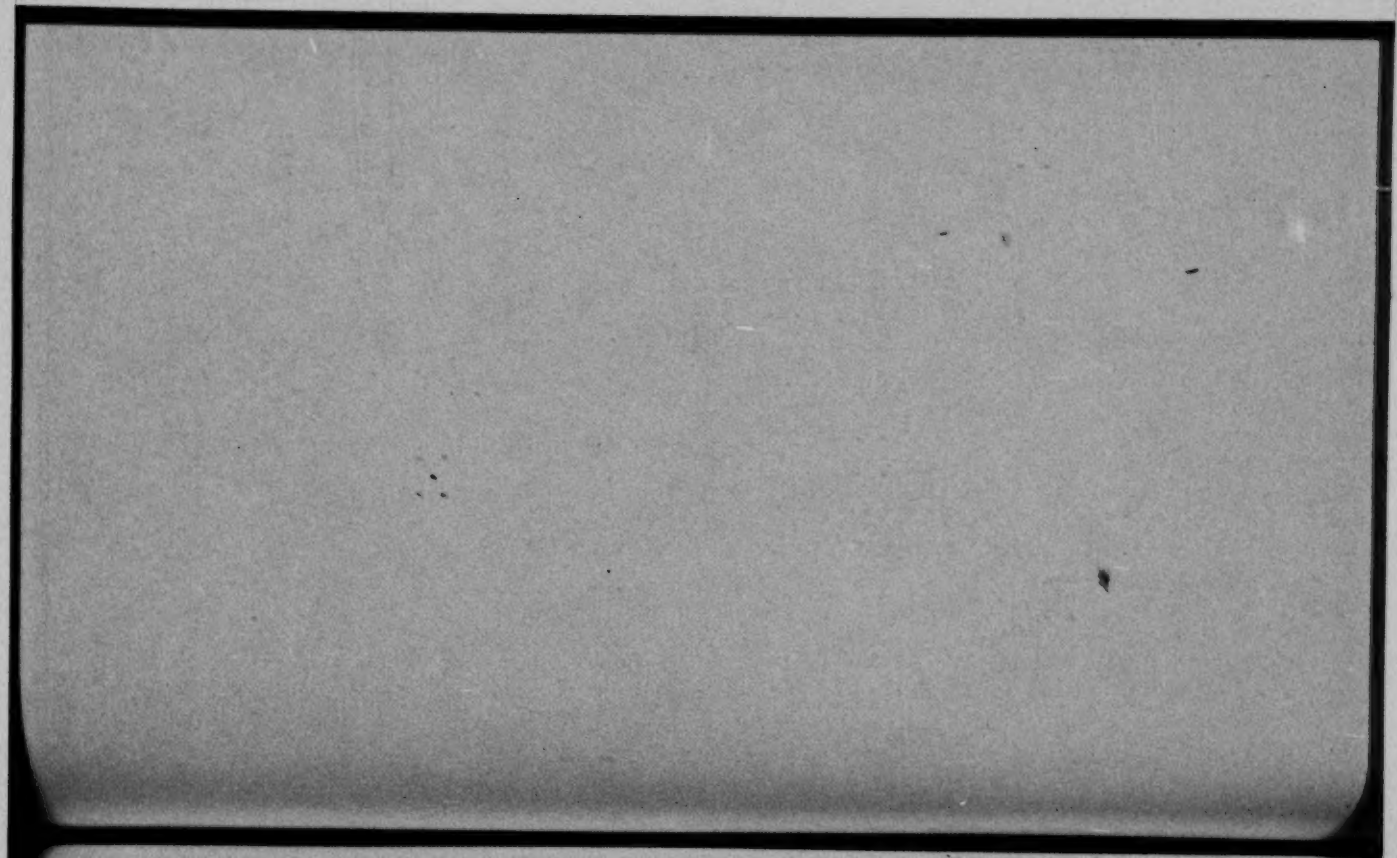
It is therefore concluded that in order to aid or abet in the doing of acts forbidden by section 1420, subdivision (d) of the Fair Employment Practice Act, the newspaper must do some act to assist, aid, or promote the unlawful discrimination by the employer or employment agency with knowledge of the unlawfulness of the discrimination. Therefore, a newspaper does

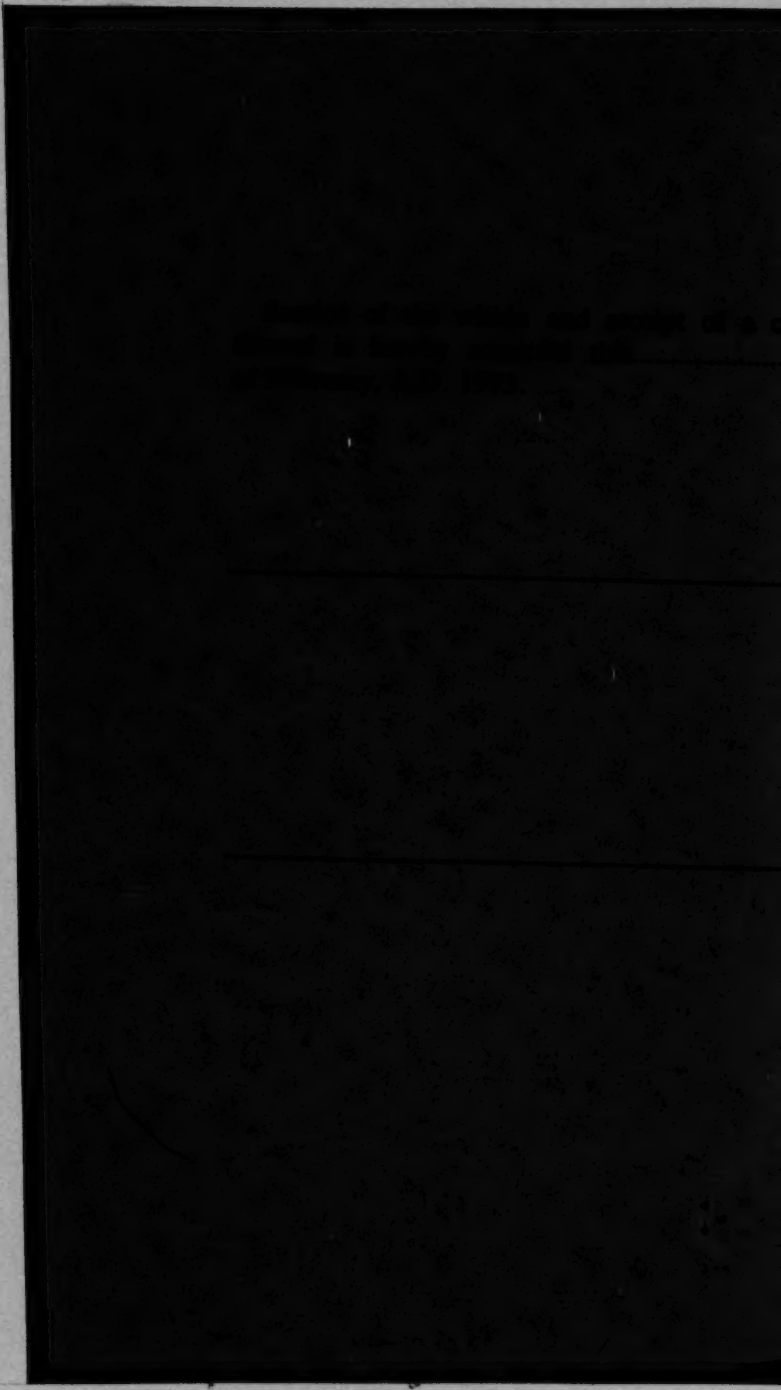
not aid or abet in the doing of acts forbidden by section 1420, subdivision (d) of the Fair Employment Practice Act merely by printing "help wanted ads" in columns segregated by sex.

However, a newspaper is a person within the meaning of section 1420, subdivision (f) of the Fair Employment Practice Act and therefore, by printing help wanted ads in columns segregated by sex where the newspaper has knowledge that there is no bona fide occupational qualification for the jobs listed aids or abets in the doing of acts forbidden by section 1420, subdivision (d) of the Fair Employment Practice Act.

Moreover, under some circumstances, where such segregation is not requested by the employer or the employment agency, the conduct of a newspaper in suggesting or insisting upon such segregation may constitute incitement or coercion in violation of section 1420, subdivision (f).

The question of whether a newspaper has knowingly aided, abetted, incited or coerced an employer or employment agency in the doing of acts forbidden by section 1420, subdivision (d) of the Fair Employment Practice Act will be a question of fact which may be determined on circumstantial evidence.





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MICHAEL RODAK, JR.

# In the Supreme Court of the United States

October Term, 1972
No. 72-419

PITTSBURGH PRESS COMPANY,
*Petitioner*

v.

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS AND THE CITY OF PITTSBURGH,
and
THE NATIONAL ORGANIZATION FOR WOMEN, INC.,
*Respondents*

*On Writ of Certiorari to the Commonwealth Court of Pennsylvania.*

## BRIEF FOR AMICI CURIAE, PENNSYLVANIA COMMISSION ON THE STATUS OF WOMEN, PENNSYLVANIA HUMAN RELATIONS COMMISSION, COMMONWEALTH OF PENNSYLVANIA

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## PRELIMINARY STATEMENT

Pursuant to Supreme Court Rules 42(2) and 42 (4), written consent of all parties having been filed with this Court, the Pennsylvania Commission on the Status of Women, the Pennsylvania Human Relations Commission and the Commonwealth of Pennsylvania, by its Attorney General, file this brief as amici curiae urging that the January 27, 1972 Order and Decision of the Commonwealth Court of Pennsylvania be affirmed.

## PENNSYLVANIA COMMISSION ON THE STATUS OF WOMEN

## STATEMENT OF INTEREST FOR AMICUS BRIEF

The Pennsylvania Commission on the Status of Women was established by Executive Order of the Governor on April 11, 1972 "to make certain that women have full opportunity to serve in every capacity as citizens of the Commonwealth, as equal participants in the economy, in politics and government, in social development, in the system of justice, and in all facets of life."

Further, the Commission was charged by the Governor with the responsibility of developing:

> "* * * all programs necessary to implement Article I, Section 27 of the State Constitution (the Equal Rights Amendment):
>
> " 'Equality of Rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual.' "

Our mandate charges us with the responsibility of initiating action and acting as strong advocates for the rights of women to insure that this purpose is carried out.

Women today are not equal participants in the economy, and one of the contributing factors respon-

sible for existing inequities in employment is sex-segregated help-wanted job advertising in newpapers. Women comprise 52 percent of the population of Pennsylvania according to the 1970 census. And they make up thirty-six and one-half percent of the Pennsylvania work force—or over one and three-quarter million members of that work force. Seventy percent of these women employed outside the home work out of economic necessity. They are either single, widowed, divorced, separated or their husbands earn less than $7,000 per year. And here it is significant to note that the United States Government has stated that a family of four needs $6,567 to subsist at a low standard of living.[1] Yet, because of discriminatory employment practices, Labor Department statitstics reveal that three-quarters of women workers are clustered in the lower-paying, less-rewarding service and clerical jobs.

Such employment discrimination does not only affect the individual woman involved. In forty percent of our family units today, both the husband and wife work full-time. Thirteen million mothers are in the labor force, of whom half have school-age children and one-third have children under the age of three. Denying these women access to equal employment opportunity and equal pay consigns not only themselves, but their families as well to suffer the added burden of financial deprivation, with all of its attendant consequences in terms of housing, health care, educational opportunity and the amenities of life.

[1] The Federal Women's Program, A Point of View, United States Civil Service Commission, 1972, p. [illegible]

And the deprivation is even more significant for those women who are heads of households. Although families headed by a woman constituted only eleven percent of all families in 1970, they accounted for thirty-seven percent of all poor families. The proportion of all poor minority families that were headed by a woman was even greater—fifty-seven percent.[2]

The consequences to society in terms of economic loss and the added burden of social welfare programs is enormous. The loss of undeveloped and thwarted human potential can hardly be measured. A study by Dr. Sandra Bem and Dr. Daryl Bem indicates that seventy-eight percent of all working women are currently employed in jobs which would be advertised in female help-wanted columns, and that less than one percent of the rest are in positions such as physician, judge, college president or professor, which would not be advertised in the newspaper.[3] And, as is pointed out in *The Hastings Law Journal* of November, 1971, "most of the better jobs for which women could qualify are reached by help-wanted columns, including the lower level jobs forced on most women."[4]

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[2] Fact Sheet on the American Family in Poverty, U. S. Department of Labor, Women's Bureau, 1971.

[3] Bem & Bem, Sex-Segregated Want Ads: Do They Discourage Female Job Applicants? In Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Educ. of the Comm. on Educ. and Labor, 91st Congress, 2nd Sess., Pt. 2, at 891, 1970.

[4] Elizabeth Boyer, Help Wanted Advertising—Everywoman's Barrier, The Hastings Law Journal, Volume 23, No. 1, November 1971.

The sex classification of jobs in newspapers, therefore, has a direct effect on the number of jobs available to the vast majority of working women. The effects are not restricted to quantitative limitations on employment opportunity. There is also a direct effect on the quality of the jobs available to women. Dr. Gerald H. F. Gardner's testimony before the office of Federal Contract Compliance on August 6, 1969,[5] documented the disparity between the quality of jobs offered under the "male" and "female" headings. The higher-paid jobs, those which carry with them career possibilities, appear in the male columns; the lower-paid, non-career jobs appear in the female columns. Historically, jobs that are demonstrably the same, such as Administrative Assistant and Executive Secretary, are advertised under headings which offer the dead-end, lower-paying secretarial job to women and the comparable position, labeled Administrative Assistant, with a built-in career ladder, to men.

Thus, the talents of well-qualified women are wasted because they are forced into jobs for which they are over-qualified with little chance for advancement, and their value is depressed in the job market, resulting in a loss to the economy as well as to the individual worker. Based on United States Labor Department statistics, as cited in the President's Economic Report to Congress of February, 1973, the average woman today earns approximately two-thirds of what similarly qualified men earn, a condition

[5] Testimony of Dr. Gerald H. F. Gardner, before the Office of Federal Contract Compliance, August 6, 1969.

which has not improved since 1956. The continued advertising of job classifications according to sex is a major factor in this discrimination. The average married woman today will work twenty-five years. A single woman will work forty-five years, two years longer than the average work span for men. On the basis of an income of $100 per week, the economic loss over a span of forty-five years to a woman earning only two-thirds the salary of a man is over $75,000, and that does not take into consideration the additional loss from lack of advancement opportunity resulting from being locked into a dead-end job.

Moreover, the loss does not stop at employment opportunity and equal pay during working years. Such discrimination has a cumulative effect, for upon retirement a woman will receive lower social security and pension benefits if her salary, upon which those benefits are based, was less than that earned by a man doing comparable work. Women, therefore, are consigned to even further economic deprivation in their retirement years. This discrimination is compounded by the fact that women live seven years longer on the average than men. In Pennsylvania alone, approximately 200,000 women over sixty-five are living in poverty.

Since its creation, the Pennsylvania Commission on the Status of Women has had as a prime concern the entire area of employment from recruitment to retirement. We have found that all forms of communications which offer job opportunities play a critical role not only in the recruitment and selection of women, but in the opportunity they have for career

development. Yet the distribution of women in the labor force continues to show an unfortunate pattern of relegating women to so-called feminine jobs.

The Equal Employment Opportunity Commission has recognized the discriminatory effects of sex-segregated help-wanted advertising and promulgated the following guideline:

> "It is a violation of Title VII (of the Civil Rights Act) for a help-wanted advertisement to indicate a preference, limitation, specification or discrimination based on sex unless sex is a bona fide occupational qualification for the particular job involved. The placement of advertisements in columns . . . headed 'male' or 'female' will be considered an expression of preference, limitation, specification or discrimination based on sex."

In order to carry out its purpose "to make certain that women have full opportunity to serve in every capacity as citizens of the Commonwealth, as equal participants in the economy . . . and to be a strong advocate for the rights of women in all areas of the Commonwealth . . .", the Pennsylvania Commission on the Status of Women supports strict adherence to the EEOC Guidelines and urges immediate cessation of sex-segregated help-wanted advertising.

## PENNSYLVANIA HUMAN RELATIONS COMMISSION

## STATEMENT OF INTEREST FOR AMICUS BRIEF

The Pennsylvania Human Relations Act was created by the legislature of the Commonwealth of Pennsylvania (Act of October 27, 1955, P. L. 744, as amended, 43 P.S. §950 *et seq.*) as an exercise of the Commonwealth's police power to protect the public welfare, prosperity, health and peace of its citizens. Established to enforce the Human Relations Act, the Pennsylvania Human Relations Commission was specifically charged with the protection of the civil rights set forth in the Act and with the implementation of the public policy of the Commonwealth, as follows:

> "It is hereby declared to be the public policy of this Commonwealth to foster the employment of all individuals in accordance with their fullest capacities regardless of their race, color, religious creed, ancestery, age, sex or national origin, and to safeguard their right to obtain and hold employment without such discrimination, to assure equal opportunities to all individuals and to safeguard their rights at places of public accommodation and to secure commercial housing regardless of race, color, religious creed, ancestry, sex, use of guide dogs because of blindness of the user or national origin."

Amendments to the Human Relations Act by the Act of July 9, 1969, P. L. 133, provided the Commission with a firm mandate from the legislature to seek out and eliminate all unlawful discriminatory practices based upon sex in the areas of employment and housing. Pursuant to this mandate, the Commission promulgated its "Guidelines on Discrimination Because of Sex", Pa. Bulletin No. 24, Vol. 1, p. 707, Dec. 19, 1970, the relevant provisions of which are set forth more fully *infra*. Section 2 of these Guidelines specifically construes Section 5(b) (2) of the Human Relations Act and sets forth that the placement of a classified employment advertisement in a publication under sex-designated column headings is construed by the Commission to be a violation of Section 5(b) (2). That Section of the Act provides as follows:

> "It shall be an unlawful discriminatory practice . . .
>
> (b) For any employer, employment agency or labor organization, prior to the employment or admission to membership, to . . .
>
> (2) Print or publish or cause to be printed or published any notice or advertisement relating to employment or membership indicating any preference, limitation, specification or discrimination based upon . . . sex."

The language of this section is substantially similar to that contained in Section 8(e) of the Pittsburgh Ordinance under review in this case. In addition, Section 5(c) of the Pennsylvania Act contains

provisions that are identical to those contained in Section 8(j) of the Pittsburgh Ordinance here under review which prohibit any person from aiding in the doing of any act declared to be an unlawful discriminatory practice by the Act.

The Pennsylvania Human Relations Commission presently has upon its docket a number of cases against major newspapers throughout the Commonwealth which raise issues identical to those before this Court on the present appeal. In addition, informal complaints have been received against other newspapermen in Pennsylvania alleging that their use of gender interest help-wanted advertising unlawfully aids employers and employment agencies in the violation of the Human Relations Act. Action upon all of these cases has been deferred by the Commission pending the outcome of the Pittsburgh Press case before this Court. The interest of this amicus, therefore, in the outcome of this appeal is critical, for the decision of this Court will provide the Pennsylvania Human Relations Commission with a definitive interpretation of the law which it seeks to enforce in this area.

## STATEMENT OF THE CASE

The *Amici*, the Commission on the Status of Women, Pennsylvania Human Relations Commission, and the Pennsylvania Department of Justice, adopt the statement of the case as set forth by Respondent, Pittsburgh Commission on Human Relations in its brief submitted to this Honorable Court.

## SUMMARY OF ARGUMENT

### I.

A newspaper's placement of help-wanted advertisements in sex-segregated columns is pure commercial communication which is outside the scope of the First Amendment protection of freedom of expression. The decisions of this Honorable Court have long sustained statutes and ordinances regulating commercial communication. This Court has always balanced the commercial and non-commercial aspects of each communication to determine whether it was worthy of First Amendment protection. In striking this balance, the Court has emphasized the functional distinctions between unprotected commercial expression and protected idea or opinion-oriented expression. The sex-designated column headings are clearly pure commercial communication which is unworthy of First Amendment protection.

It has long been held by this Court that neutral economic regulations which have only an incidental effect on the freedom of expression do not violate the First Amendment. The doctrinal basis for this principle is that state and local governments may constitutionally impose limitations on the freedom of expression of the limitation is a regulation of a substantial evil pursuant to a lawful exercise of the police power. Federal, state, and local governments have all recognized the deleterious effect of denying equal access to employment opportunities to women.

This Court has sustained statutory regulation of the employer-employee relationship even when it impinged on the fundament public communication of political ideas. It follows, *a fortiori*, that the Pittsburgh Ordinance, which merely regulates commercial speech, is constitutional.

## II.

An abundance of testimony and documentary evidence exists upon the record to support the finding by the Pittsburgh Commission that the Pittsburgh Press aided employers to engage in discriminatory employment practices through its use of sex-designated column headings in its employment advertising. The Commission found that numerous employers violated Section 8(e) of the Pittsburgh Ordinance by causing to be published employment advertisements that indicated discrimination because of sex. It was further found that the Pittsburgh Press aided in these violations of Section 8(e) by using sex-designated column headings in its help-wanted advertising and, therefore, was itself in violation of Section 8(j) of the Ordinance. Under the law of aiding and abetting these findings alone were sufficient to support a conclusion that the Pittsburgh Press aided in violations of the Pittsburgh Ordinance.

Finally, testimony by Petitioner's classified advertising manager unequivocally established both that advertisers intended to express a preference for applicants of a particular sex and that Petitioner was aware of this fact and aided those advertisers to indicate such preferences in its publication. Considera-

tion of the aforementioned factors compels the conclusion that the finding by the Pittsburgh Commission on Human Relations was not violative of due process of law.

## ARGUMENT

### I. THE PROHIBITION OF SEX-SEGREGATED NEWSPAPER ADVERTISEMENTS DOES NOT VIOLATE THE FIRST AMENDMENT

#### A. The Column Headings of the Classified Help Wanted Advertisements Are Purely Commercial Speech Which Are Outside the Scope of the First Amendment Freedom of Expression

*Valentine v. Chrestensen*, 316 U.S. 52 (1942), is the seminal case analyzing the nexus between the First Amendment guarantee of freedom of expression and commercial expression. In *Chrestensen* this Court sustained the constitutionality of an ordinance restricting the distribution of commercial handbills stating that:

> "We are equally clear that the Constitution imposes no such restraint [on limitations of free speech] on purely commercial advertising." 316 U.S. at 54.

In *Chrestensen*, as in the instant case, the commercial communication is juxtaposed with allegedly protected speech. In *Chrestensen*, in order to avoid a city ordinance which restricted the circulation of commercial handbills, the defendant printed a protest on the back of handbills. The Court concluded

that since the protest had been added with the intent and for the purpose of evading the prohibition of the ordinance, it was not communication worthy of First Amendment protection. This Court should reach the same result in the instant case. Clearly the Pittsburgh Commission on Human Relations can prohibit the statement of sexual preference in the body of a classified help-wanted advertisement. This Court should not allow a newspaper to achieve the same discriminatory effect by placing advertisements in columns with sex-preference headings claiming protection for these headings under the First Amendment. To reverse the decision of the court below would be to allow the Pittsburgh Press to do by indirection that which it cannot do directly. In addition, it would also reject the *Chrestensen* doctrine that purely commercial advertising may be regulated.

Since *Chrestensen* was decided, the key to subsequent cases discussing the First Amendment and advertising has been the determination of whether the disputed forms of expression were primarily commercial or noncommercial. Professor Emerson has defined the commercial sector as:

> "The production and exchange of goods and services for profit, as distinct from the production or exchange of ideas on political, religious, artistic, and similar matters." Emerson, *The Freedom of Expression*, 414 (1970).

This definition provides an excellent framework within which to analyze the decisions of the Court delineating the distinctions between protected First Amendment expression and commercial or business

expression. It emphasizes functional distinctions between unprotected commercial expression and protected idea or opinion-oriented expression instead of formalistic incantations like "editorial policy", "controversial subject", and "public convenience".

The Court has always balanced the commercial and noncommercial aspects of a given communication to determine whether it was worthy of First Amendment protection. This Court emphatically made this point when it rejected respondent's argument in *New York Times Company v. Sullivan*, 376 U.S. 254 (1964), that the allegedly libelous statements were not entitled to any First Amendment protection because they appeared in a paid advertisement. In *Sullivan*, the Court reviewed a libel judgment which had been entered against the New York Times as a result of a full page advertisement which appeared in the Times allegedly criticizing certain officials of Birmingham, Alabama, and supporting the civil rights work of the late Dr. Martin Luther King. The Court rejected the attempt of respondents to equate the word "commercial" with the word "paid". 376 U.S. at 265. The obvious meaning of this analysis is that when the *Chrestensen* court used the word "commercial" it meant the production and exchange of goods and services for profit, not the payment of money to procure the publication of a particular communication. Thus, the Court rejected the idea that the *form* of a communication determines whether it is worthy of First Amendment protection and adopted a balancing test. It balanced the effect the communication would have on the exchange of goods and services in the market place against the effect it

would have on the exchange of information in the market place of ideas. Communication is afforded First Amendment protection whenever its primary focus is the market place of ideas without regard for the context in which it appears. cf. *Smith v. California*, 361 U.S. 147, 150 (1959); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64 n.6 (1963). This Court has clearly articulated its reason for refusing to consider form over substance. It said: "Any other conclusion would discourage newspapers from carrying 'editorial advertisements' of this type, and so might shut off an important outlet for the promulgation of information and ideas . . ." 376 U.S. at 266.

This Court resolved a similar problem in *Breard v. Alexandria*, 341 U.S. 622 (1951). In that case the Court sustained the constitutionality of a "Green River" ordinance prohibiting door-to-door solicitations for the sale of goods without the prior consent of the householder. Petitioners, magazine publishers, argued that the enforcement of this ordinance against people selling magazine subscriptions was a violation of the First Amendment. The Court balanced the fact that the First Amendment activity of magazine publishing was partially financed by door-to-door subscription solicitations against the purely commercial profit motive in the solicitation of magazine subscriptions. After distinguishing the ordinance from a broader ordinance precluding all solicitations, cf. *Martin v. Struthers*, 319 U.S. 141 (1943), the Court concluded that the Alexandria ordinance was sufficiently narrow to be construed as a commercial regulation rather than a burden upon publishers who

were seeking funds to finance the dissemination of ideas, and as such it was not in violation of the First Amendment.

*Ginzburg v. United States*, 383 U.S. 463 (1966), is another case in which this Court has resolved a significant First Amendment issue by considering the substance of the written material in the context in which it appeared rather than the mere form of the publication out of context. In *Ginzburg*, this Court refused to consider the content of *Eros* and the companion publications separately from the advertising which proceeded or accompanied them. The Court assumed that the prosecution could not have succeeded on the basis of the content of the publications alone, but sustained the conviction because it was proper to consider the content in the context in which it appeared. 383 U.S. at 465. Ginzburg's publications appeared accompanied by advertising which made it clear that their purpose was to pander to the prurient interests of the readers.

Similarly, the purpose of sex-designated help-wanted advertising columns is clear. It is to encourage the continuation of illegal sex-stereotyping in the employment market. The decisions of this Court provide a sound rationale for sustaining the constitutionality of Section 8(j) of the Pittsburgh Human Relations Ordinance. Ordinance No. 75, February 27, 1967, as amended by Ordinance No. 345, July 8, 1969. This Court clearly articulated this rationale when it said:

"Material sold solely to produce sexual arousal, like commercial advertising, does not

escape regulation because it has been dressed up as speech, or in other contexts might be recognized as speech." *Ginzburg*, supra, at 474 n.17.

Nevertheless, the Pittsburgh Press insists that the placement of help-wanted advertisements in sex-designated columns is an editorial decision worthy of protection of the First Amendment. This claim unsupported by authority demeans the great tradition of First Amendment freedom which this court has long upheld. Although this is the first case raising the specific factual issue of whether classified column headings are commercial speech outside the scope of the First Amendment, federal courts have recently reaffirmed the doctrine that purely commercial advertising is not protected by the First Amendment in cases involving the regulation of classified advertising to effectuate the enforcement of federal civil rights acts.

The Court of Appeals in *United States v. Hunter*, 459 F. 2d 205 (4th Cir. 1972), cert. denied, 405 U.S. 931 (1972), sustained the constitutionality of Section 804(e) of the Civil Rights Act of 1968; 42 U.S.C. §3604(e). That section prohibits the printing of discriminatory classified advertisements for the sale or rental of residential dwellings. In so holding the Court of Appeals correctly asserted that it was following an unbroken line of Supreme Court authority. 459 F. 2d at 211.[1]

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[1] Two United States District Courts have also sustained the constitutionality of 42 U.S.C. 3604(e): *Holmgren v. Little Village Community*, Reporter 342 F. Supp. 510 (N.D. Ill. 1971); *United States v. A. B. Smythe Company, Inc.* (No. 70-2236, N.D. Ohio, 1970).

Similarly, in *Greenfield v. Field Enterprises*, 4 E.P.D. §7763 (N.D. Ill., 1972), the court held that newspapers were not covered by §704(6) of the Civil Rights Act of 1964, 42 U.S.C. §2000(e)-3(b), as a matter of statutory construction. However, it went on to dismiss as without basis the First Amendment issue raised by the defendant Chicago Tribune. Thus, the District Court indicated that a federal regulation of classified employment advertisement would not violate the First Amendment if it were drafted so as to regulate newspaper advertising.

The Pittsburgh Commission on Human Relations, the Court of Common Pleas of Allegheny County, and the Commonwealth Court of Pennsylvania have made the same factual determination in this case that is implicit in all of the cases discussed supra. Indeed, the Court of Common Pleas said: "It is difficult to think of a more commercial aspect of the newspaper than captions to the classified advertisements section" (R. 43a.) Thus, the courts below have determined that the column heading above the help-wanted classified advertisements in the Pittsburgh Press are pure commercial communication associated with the production and exchange of goods and services for profit rather than noncommercial speech associated with the production and exchange of information in the marketplace of ideas.

The recent cases sustaining strict Federal Communications Commission regulation of cigarette advertising demonstrate that the Pittsburgh Commission on Human Relations and the Pennsylvania courts struck the appropriate balance when they each de-

termined that column headings for classified help-wanted advertisements were pure commercial communication subject to strict regulation rather than protected noncommercial communication. In *Banzhaf v. FCC*, 405 F. 2d 1082 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969), the Court of Appeals sustained an FCC ruling that stations and channels which broadcast cigarette advertisements were required to provide substantial amounts of time for anti-smoking commercials. It rejected the First Amendment argument saying, "many cases indicate that product advertising is *at least* less vigorously protected than other forms of speech". (emphasis added) *Banzhaf*, supra, at 1101. The Court noted the relevance of *Head v. New Mexico Board of Examiners*, 374 U.S. 424 (1963), a case which sustained state regulation of price advertising by optometrists without discussing the First Amendment issue and reasoned that such regulations do not raise Constitutional problems because the regulated communications do not affect the political process, contribute to the exchange of ideas, provide information on matters of public importance or limit a form of individual self-expression, *Banzhaf*, supra, at 1101. Thus, the Court of Appeals recognized that the commercial purpose of product market oriented advertising so outweighs any informational value inherent in the advertising that it need not be afforded the protection of the First Amendment.

Moreover, this Court has affirmed the holding of a three judge court that the FCC may constitutionally ban all cigarette advertising in the electronic telecommunications media. *Capital Broadcasting Co. v.*

*Kleindienst*, 405 U.S. 1000 (1972), aff'g. *Capital Broadcasting Company v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971). In explaining its holding, the District Court effectively deals with the objection raised by the Pittsburgh Press that the order of the Human Relations Commission circumscribed the Press's ability to engage in social commentary. It said:

> "Thus, contrary to the assertion made by petitioners, Section 6 does not prohibit them from disseminating information about cigarettes, and therefore, does not conflict with the exercise of their first Amendment rights." At 584.

The situation in this case is identical to that in the long line of cases discussed above. In each of these cases the legislative body or administrative agency has attempted to regulate an activity which had some of the aspects of protected First Amendment freedom of expression and some of the aspects of unprotected commercial communication. In each case, the Court balanced the competing claims to determine whether the communication more nearly resembled protected communication of ideas or the mere exchange of information pursuant to the production and exchange of goods and services for profit. In all of these decisions, including *New York Times v. Sullivan*, supra, the Court refused to be bound by the labels which can so easily be placed on modes of communication or methods of conduct. Rather the court made a basic factual determination as to the nature of the activity which was to be regulated. In all of those cases, the Court recognized that what was being regulated was not the free expression of ideas,

but the manner in which people and corporations sold products to make profit. The Pittsburgh Commission on Human Relations and the Courts below have made the requisite factual determination that column headings in help-wanted classified advertising are commercial communication rather than the free expression of ideas. Therefore, the ordinance of the City of Pittsburgh prohibiting a newspaper from arranging help-wanted advertisements under columns labeled "Jobs—Male Interest", "Jobs—Female Interest", and "Jobs—Male—Female" does not violate the First Amendment of the United States Constitution because column headings are not expression protected by the First Amendment.[2]

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[2] To hold otherwise would by implication invalidate innumerable other regulations of advertising which have been repeatedly sustained by Courts against all manner of challenges. Cf. *N.Y. State Broadcasting Association v. U. S.*, 414 F. 2d 990 (2d Cir. 1969); *FTC v. Standard Educational Society*, 302 U.S. 112 (1937); *Giant Foods, Inc. v. FTC*, 116 U.S. App. D.C. 227, 322 F. 2d 977 (1963), *cert. dismissed* 376 U.S. 967 (1964); *Camp-of-the-Pine v. NYT Co.*, 53 N.Y.S. 2d 475 184, Misc. 389 (1945); *Donaldson v. Read Magazine*, 333 U.S. 178 (1947); *REA v. New York*, 336 U.S. 106 (1949); *SEC v. Texas Gulf Sulphur Co.*, 446 F. 2d 1301 (2nd Cir. 1971), *cert. denied* 404 U.S. 1005.

## 1. The Pittsburgh Human Relations Ordinance as Interpreted Below Is a Valid Regulation of Economic Activity Which Only Incidentally Affects the Freedom of Expression and Does Not Violate the First Amendment

In *Branzburg v. Hayes*, 408 U.S. 665 (1972), a case holding that the First Amendment does not relieve newspaper reporters of the obligation to respond to a grand jury subpoena and answer relevant questions, this Court has reaffirmed the doctrine that otherwise valid statutes of general applicability are not invalid because they indirectly affect the press. The Court said:

> "It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. Under prior cases, otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed. The Court has emphasized that '[t]he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and properties of others.'" *Associated Press v. NLRB*, 301 U.S. 103, 132-133, 57 S. Ct. 650-656, 81 L. Ed. 953 (1937), 408 U.S. at 682, 683.

*Branzburg*, supra, was the most recent of a long line of cases in which the Court has defined the lim-

ited area in which regulation of otherwise protected speech is permitted. This area can be defined as the regulation of conduct which is the inevitable consequence of protected speech or expression. The placement of help-wanted advertisements in sex-designated columns is conduct which may constitutionally be regulated. It is an activity which is more likely to produce illegal discriminatory conduct than to facilitate the free exchange of ideas.

In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1941), the Court sustained as constitutional a narrowly drawn and strictly construed breach of peace statute even though it had been used to punish strictly verbal conduct. The Court explained that such a statute punishing conduct seemingly within the ambit of the First Amendment's protections was not invalid because the public interest in order clearly outweighed any value the statements might have as a step toward truth. 315 U.S. 568 (1941).

This is the same doctrine that had been announced by Mr. Justice Holmes in *Schenck v. U. S.*, 249 U.S. 47 (1919). The *Schenck* opinion is instructive because the substantive evil therein was not the violent overthrow of the government or some other act of violence, but rather opposition to conscription during World War I. In that case, the Court recognized that even certain kinds of written handbills containing clearly political ideas would not be protected by the First Amendment if their immediate effect would be to produce action in violation of a validly-enacted statute. Thus, speech or writing may only be constitutionally regulated if it is so closely connected

with illegal action that the two cannot be separated. When speech is thus regulated, the regulation is a limitation on the freedom of expression. The limitation is justified because the Court must balance important competing social values and choose one. This need to balance competing values was most clearly articulated when this Court modified the "Clear and Present Danger" test and accepted Judge Learned Hand's explicit recognition of the need to balance:

> "In each case . . . [courts] must ask whether the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *Dennis v. United States*, 341 U.S. 494, 510 (1951) quoting from 183 F. 2d 201, 212 (2d Cir. 1950).

The answer to that question in this case is clear. State legislatures, the United States Congress and municipal governments have all recognized the evils of employment discrimination.[8] Indeed, the prin-

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[8] Cf. Conn. Fair Employment Practice Act, Conn. Gen. Stat. §§31-126(e) (f) (1961 Rev., 1969 Supp.); Hawaii Fair Employment Practice Law, Hawaii Rev. Stat. §§378-2 (3) (6) (1968); Iowa, Civil Rights Act, Iowa Code Ann. §§601A.7.1.C, 601.8.1 (1973 Supp.). Kansas Act Against Discrimination, Kan. Stat. Ann. §§44-1009(c) (e) (1972); Mass. Fair Employment Practice Act, Mass. Ann. Laws Ch. 151B, §§4(3) (5); Mich. Fair Employment Practice Act, Mich. Stat. Ann. §§17.4581(3a)(d)(1), 17.4581(3)(g)(1968); Minn. State Act Against Discrimination, Minn. Stat. §§363.-03(1)(4(b) (1)(6)(2) (1971). Mo. Fair Employment Practices Act, Mo. Rev. Stat. §§296.020(3) (5) (1969); N. H. Law Against Discrimination, N. H. Rev. Stat. Ann. §§354-

ciple that employment discrimination is a violation of the Fourteenth Amendment is so well established that it needs no citation.

At the hearing of the Pittsburgh Commission on Human Relations on January 15, 1970, and February 26, 1970, Dr. Sandra Bem convincingly demonstrated that even where there is a plainly printed disclaimer the inevitable effect of sex-designated column headings in classified help-wanted advertisements was to discourage women from applying for jobs which appeared in the columns designated "Jobs—Male Interest" (R. 64a-88a, 225a-261a). Since the vast majority of jobs, especially the high-paying jobs, appeared in the columns headed "Jobs—Male Interest" (R. 301a, 303a, 355a), the inevitable effect of sex-segregated help-wanted advertising is to deny women equal access to all available jobs.

In its brief, the Pittsburgh Press makes much of the fact that it does not intend to foster unlawful

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A:8 (III, VI) (1955, 1972 Supp.); N. J. Law Against Discrimination, N. J. Stat. Ann. Tit. 10, Ch. 5, §§12(c) (e) (1972 Supp.); N. M. Human Rights Act, N. M. Stat. Ann. §§4-33-7-D, I(1) (1953, 1971 Supp.); N .Y. Human Rights Law, §§296-1(d), 6 (McKinney, 1972); Ore. Fair Employment Practice Act, Ore. Rev. Stat. §§659.030(3)(5) (1971); Pa. Human Relations Act, Pa. Stat. Ann. Tit. 28, §§955 (b)(2) (e) (1964, 1972 Cum. Supp.); R. I. Fair Employment Practices Act, R. I. Gen. Laws, §§28-5-7(D)(4) (f) (1956, 1972 Supp.); Utah Anti-Discrimination Act of 1965, Utah Code Ann. §§§34-5-b(d) (e) (1953 Rep. Vol. 5, 1971 Supp.); Wash. Law Against Discrimination, Wash. Rev. Code, §49.60.180(4), §49.60.220 (1972 Supp.); N. Y. City Human Rights Law, N. Y. City Admin. Code, §§B1-7.0(1) (d) 7.0(6) (1971).

discrimination. This argument misstates the crucial issue. The issue is not whether the Pittsburgh Press intended to foster employment discrimination but whether the Press intended to foster any differential treatment of men and women which is an unfair employment practice in violation of Section 8 of the Pittsburgh Human Relations Ordinance. In petitioner's brief, they admit that the purpose of the sex-designated column headings was to highlight the jobs which are more suitable for members for a particular sex. This admission is an admission of an intent to treat men and women differently which is a violation of the ordinance. Moreover, Mr. Robert Seli, the classified advertising manager of the Pittsburgh Press, testified that whenever necessary ad-takers inquired as to where an employer wanted an advertisement to appear because most jobs were male or female oriented jobs and placing the advertisement in the appropriate column was necessary to satisfy the Press's customers (R. 128a, 170a-173a). This testimony further establishes the requisite intent to foster the differential treatment of men and women in the employment market which is an unfair employment practice.

Sex-segregated help-wanted advertising clearly perpetuates a substantial evil which the City of Pittsburgh, the Commonwealth of Pennsylvania, and the United States have recognized and sought to eliminate. Cf. Pennsylvania Human Relations Act, Act of July 9, 1969, P. L. 133, 43 P.S. 955; Title VII, Civil Rights Act of 1964, 42 U.S.C. §2000 et seq. This evil is employment discrimination which confines women to traditional "women's jobs" and denies them access

to higher paying jobs which have previously been available only to men. It will continue to exist and indeed may grow more serious unless newspapers are required to refrain from publishing sex-segregated help-wanted advertisements. Therefore, this Court should not hesitate to sustain the constitutionality of the order of the Pittsburgh Commission on Human Relations. The restrictions on freedom of expression inherent in this form of regulation is *de minimis* because Section 8(j) of the Pittsburgh Human Relations Ordinance, does not prevent the Pittsburgh Press from publishing articles and editorials expressing any and every conceivable point of view on the issue of employment discrimination and the role of women in the society. Cf. *Capital Broadcasting*, supra, at 584.

In two cases analyzing the powers and duties of the National Labor Relations Board, this Court has rejected First Amendment challenges to the National Labor Relations Act. These cases are significant because they show that the regulation of the employer-employee relationship is so important that it justifies limitations upon the freedom of expression and because the expression and communication which are regulated in these cases is the exchange of political ideas.

This court has held that an employer may express any view on unionism he wanted so long as he does not do so as part of a coercive course of conduct. *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469 (1941). In so holding the Court recognized that in certain circumstances an employer's speech may be

so closely related to an illegal course of conduct as to be verbal acts more like conduct than protected communication. Thus, in *Virginia Electric & Power Co.*, this Court said the statutory right of organization was so important and at the same time so frail that speech which in most contexts would be protected, could as part of a coercive course of conduct, be prohibited by the NLRB. Like the right of laborers to organize and bargain collectively shortly after the enactment of the National Labor Relations Act, the right of women to be equal participants in the economic life of the country a few short years after the enactment of Title VII of the Civil Rights Act of 1964 is in practice a frail one. Therefore, when a major metropolitan newspaper chooses to continue a policy of sex-segregated help-wanted advertisements, the practice must be prohibited to further the important statutory goal of guaranteeing full equality of economic opportunity for all.

Similarly, in *American Communications Association v. Douds*, 339 U.S. 382 (1950), this Court sustained the constitutionality of Section 9(a) of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947, 51 Stat. 136, 146; 29 U.S.C. §§141, 159(h), which required union officers to take a noncommunist oath before they could have access to the NLRB's enforcement mechanisms. The Court reasoned that the Section did not abridge the freedom of association inherent in the First Amendment because Congress intended to regulate harmful conduct, the political strike, rather than political affiliations or beliefs. In so holding, the Court said:

". . . the right of the public to be protected from the evils of conduct, even though First Amendment rights of persons or groups are thereby in some manner infringed, has received frequent and constant recognition by this Court." *Douds*, supra, at 398. Citing *Kovacs v. Cooper*, 336 U.S. 77 (1949) (regulation of blaring sound truck during labor dispute sustained); *Cox v. New Hampshire*, 312 U.S. 569 (1914) (prosecution of unauthorized religious parades sustained).

The analogy between the *Pittsburgh Press* case and the National Labor Relations Board cases supports the position of the Pittsburgh Commission on Human Relations, the National Organization of Women and the *Amici* who have submitted this brief. In this case, as in *Virginia Electric § Power Co. v. NLRB and American Communications Association v. Douds*, there is a neutral economic regulation which modifies the common law employer-employee relationship in order to promote economic prosperity and the welfare of the nation. A minor restriction on First Amendment freedoms is inherent in each regulation. In *Virginia Electric & Power* the restriction is on the right of an employer to state an opinion on a controversial political issue, the right of employees to form unions and bargain collectively; while in *Douds* the restriction is on the right of a union officer to be a member of the Communist Party. In each case, the restriction involves a limitation on the public communication of political ideas. This is the type of communication which formed the theoretical and philosophical basis of the First Amendment. cf.

Meiklejohn, *The Freedom of Expression Is an Absolute*, 1961 Supreme Court Review 245. Thus, this Court has repeatedly sustained minor infringements upon the most fundamental forms of political expression where the purpose of the infringement is to protect the public from a serious evil or promote economic prosperity through regulation of the employer-employee relationship. It follows, *a fortiori*, that the Court must sustain the order of the Pittsburgh Commission on Human Relations and the courts below since they promote economic prosperity and equality of opportunity and only infringe on commercial communication which is much less basic than the political communication in *Douds* and *Virginia Electric & Power Company*.

## II. THE FINDING THAT PETITIONER AIDED EMPLOYERS TO ENGAGE IN UNLAWFUL EMPLOYMENT PRACTICES BY ARRANGING HELP-WANTED ADVERTISEMENTS UNDER SEX-DESIGNATED COLUMN HEADINGS IS NOT VIOLATIVE OF DUE PROCESS OF LAW

The Pittsburgh Commission on Human Relations has found that in its employment advertising the Pittsburgh Press was aiding employers to engage in discriminatory employment practices through the use of sex-designated column headings. The Commission concluded, as did the Courts below, *Pittsburgh Press Co. v. The Pittsburgh Commission on Human Relations*, 4 Pa. Commonwealth Ct. 448, 287 A. 2d 161 (1972), that such an arrangement of help-wanted advertising constituted a violation of Section 8(j) of Ordinance No. 75 of February 27, 1967, of the City of Pittsburgh, as amended by Ordinance No. 395, approved July 8, 1969.

Section 8(j) of the Ordinance states that it shall be an unlawful employment practice,

> "(j) For any person . . . to aid, incite, compel, coerce or participate in the doing of any act declared to be an unlawful employment practice by this ordinance, . . ."

The Commission found that the Pittsburgh Press was aiding in the commission of the unlawful employment practice set forth in Section 8(e) of the Ordinances, as follows:

"It shall be an unlawful employment practice . . . except where based upon a bona fide occupational exemption certified by the Commission . . .

(e) For any employer, employment agency or labor organization to publish or circulate, or to cause to be published or circulated, any notice or advertisement relating to employment . . . which indicates any discrimination because of . . . sex."

Discrimination is defined in §4(B) of the ordinances to ". . . include any difference in treatment based on . . . sex."

It is crucial to note that the unlawful employment practice which the Pittsburgh Press was found to have aided was solely that of publishing or causing to be published an employment advertisement which indicated sexual differentation. It is within the police power of lawmaking bodies to enact statutes or ordinances making it unlawful for a newspaper to aid any employer, employment agency or labor organization to publish or cause to be published any advertisement relating to employment which indicates a difference in treatment based on sex. It is clear that the purpose of the ordinance in question was reasonably to promote the economic and social welfare of the people of Pittsburgh. The ordinance clearly prohibits the conduct of the Pittsburgh Press and indeed, has been interpreted by the Pennsylvania Courts to prohibit newspapers from using gender interest column headings in the employment want-ads of newspapers. The decision as to whether or not the use of gender interest headings has a substantial relation-

ship to the existence of a denial of employment opportunity to women, on account of sex, is a basic legislative decision. In *Ferguson v. Skrupa*, 372 U.S. 725 (1963), this Court stated:

> "Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation." At 729.
>
> "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislature bodies, who are elected to pass laws." At 730.
>
> "Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to 'subject the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.' It is now settled that States 'have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.'" At 730.

Despite Petitioner's assertions to the contrary there is no allegation on the record that the newspaper aided in an employer's refusal to hire an individual because of their sex, an action which would constitute a violation of Section 8(a). Petitioner would

direct our attention away from the very allegation against it and urge that there must be a showing of "... a denial of employment opportunity to women on account of sex" (Brief for Petitioner at 25) to support the "Decision and Order" of the Commission in this matter. This argument misconstrues the nature of the finding that was made by the Commission and upheld by the courts below. The only proof that was necessary to uphold the violation of Section 8(j) here in question was that, (1) an employer caused an employment advertisement to be published that indicated discrimination because of sex, and (2) the Pittsburgh Press aided in the doing of that act. There can be no doubt that there is an abundance of evidence on the record to support a finding that these two elements are present in this case.

In its adjudication the Commission ruled that employers violated Section 8(c) when they placed advertisements in the sex-segregated help-wanted columns of the Pittsburgh Press.

> "An employer by causing an employment advertisement to be placed in either the male interest column or female interest column is, in our judgment, indicating a difference in treatment as to that employment based upon sex, hence engaging in unlawful discrimination" (R. 9a).

This finding was fully supported by testimony and evidence presented to the Commission, and is further buttressed by similar rulings of growing numbers of state civil rights agencies and by the United States

Equal Employment Opportunity Commission. The Pennsylvania Human Relations Commission whose jurisdiction would encompass the present situation, similarly holds that:

> "The placement of an advertisement seeking applicants for employment in a classified advertisement section under 'Help Wanted—Male', or 'Help Wanted—Female Interest' or similar columns with a sex designation is considered to be a violation of §5(b)(2) [Pa. Human Relations Act, Act of July 9, 1969, P. L. 133, 43 P.S. 955] if an employer is covered by the Act and has not received a bona fide occupational qualification exemption from the Commission. The mere fact that the newspaper or magazine publishing such advertisements publishes a disclaimer provision advising that applicants of one sex should assume that applicants of either sex will be considered for employment is not considered by the Commission to be a defense to a complaint alleging a violation of §5(b)." Guidelines on Discrimination Because of Sex, Pa. Bulletin No. 24, Vol. 1, p. 707, Dec. 19, 1970.

In a recent case involving alleged sex discrimination against men, the Court of Appeals for the Fifth Circuit recognized the adverse effect on potential applicants for employment that advertising under sexually designated column headings can have upon equal employment opportunities. As the Court explained in *Hailes v. United Air Lines*, 464 F. 2d 1006, 1009 (5th Cir. 1972):

> ". . . the placing of the ad in the 'Help Wanted—Female' column without a corresponding ad

in the 'Help Wanted—Male' column so plainly indicates a preference for females it cannot be neutralized by the self-conferred title of 'Equal Opportunity Employer'."

Testimony by Robert Seli, Classified Advertising Manager for the Pittsburgh Press, provided additional evidence both that advertisers intended to express a preference for applicants of a particular sex and that the Press was aware of this fact and aided those advertisers to indicate such preferences in their publication (R. 125a-126a):

"Q. As far as employment opportunity ads are concerned, do your ad takers have the discretion to place jobs in any particular column if the advertiser does not express any preference?

A. No, sir, most of the people, who call in have a preference. Let's put it this way. They know where they want the ad to run—automobile or real estate or male interest or female interest. They express this interest where they would like to have this ad placed. In what category. At times, when they do not express a preference, we ask them where they would prefer to have it placed.

Q. If the advertiser clearly expresses a preference for male or female, the Press abides by the preference expressed by the advertiser?

A. Yes, but there is a little difference here. If somebody asks to place a help wanted ad under automobile advertising, we will not accept it. It has to run under help wanted. It's a job offering. It's run under opportunities.

Q. When no preference is expressed by advertisers, you then solicit from the advertiser a response to whether he has a preference?

A. Yes, where they would prefer to have it placed.

Q. In case there is no preference expressed, even after solicitation, who then at the Pittsburgh Press decides which column it goes it?

A. I don't think we have this problem, really.

Q. In each case there is an expression of preference by the advertiser?

A. Yes."

To emphasize this point, Mr. Seli further elaborated as follows (A. 173):

"Q. Is this the only type of—if I may use the word—education for your advertisers? Do you then proceed to tell them of the several categories that should go under this or that, take your choice?

A. We tell them where the majority is—or we try to find out what type of a person they are looking for. Are they looking for a man, or are they looking for a woman? They know this. And *they are interested or more interested in a man or more interested in a woman. They know this, and they state this. This is where they want it.*" (Emphasis supplied.)

This testimony, when viewed in conjunction with the numerous nonexempted employment advertisements placed in the sex-segregated help wanted columns of the Pittsburgh Press (R. 305a-353a), con-

clusively supports a finding that a violation of Section 8(e) of the Pittsburg Ordinance has occurred. By actively aiding those advertisers to express through publication a preference based upon sex, and therefore to violate Section 8(e), the Pittsburgh Press itself has violated Section 8(j).

Petitioner places great weight upon its contention that due process requires a showing that the Pittsburgh Press aided a specific advertiser, and that that advertiser must be charged and found to be in violation of the Ordinance. This position misconstrues the law of aiding and abetting.

In *United States v. Provenzano*, 334 F. 2d 678 (3rd Cir. 1964), cert. denied, 378 U.S. 947, the Court stated that "It is not a prerequisite to the conviction of the aider and abettor that the principal be tried and convicted or in fact even be identified. See *Gray v. United States*, 260 F. 2d 483 (D.C. Cir. 1958)." In discussing the crime of forgery, the Court in *United States v. Dunfur*, 461 F. 2d 662 (10th Cir. 1972), explained that although the person who allegedly uttered the forged check was not charged with any offense, . . . "all that the prosecution need prove in this respect is that the offense has been committed." (citing cases). Further authority for the law of aiding and abetting may be found in *Von Patzoll v. United States*, 163 F. 2d 216 (10th Cir.), cert. denied 332 U.S. 809 (1947); *Meredith v. United States*, 238 F. 2d 535, 542 (4th Cir. 1956); and *United States v. Doughty*, 460 F. 2d 1360 (7th Cir. 1972), and cases cited therein.

As set forth above, numerous violations of Section 8(e) of the Pittsburgh Ordinance, in which Petitioner

has aided, appear in the record and were testified to at the hearing held by the Commission. Although unnecessary in order to establish an aiding and abetting violation of the Ordinance (§8(j)), further and more specific proof of sexually discriminatory employment practices of an advertiser which Petitioner aided in presenting its ad to the public is disclosed in the record. As described by the Commonwealth Court of Pennsylvania, supra, at 4 Pa. Commonwealth Ct. 460:

> "We note here that contrary to the argument of the Pittsburgh Press that the record does not disclose any specific incident of discrimination against any specific woman, a careful reading of the record indicates that one witness did in fact testify to such a result. Her testimony indicated that she responded to an ad placed in the 'Jobs—Male Interest' column for a 'dishwasher' and was advised by an agent of the employer that he had been given specific instructions not to hire a female for the advertised job. The interesting point is that counsel for the Pittsburgh Press, while arguing that this testimony was irrelevant, admitted on the record that this witness may well have had legitimate grounds upon which to file a complaint before the Commission. In view of the fact that the discriminatory practice came about as a result of an ad placed by the employer and was published in an arbitrarily segregated 'male' column, we hold that there was substantial evidence placed in the record to support the charge made by N.O.W."

Although the proceeding before the Commission was not a criminal matter, the evidence presented certainly was sufficient to support a finding of aiding and abetting by the Pittsburgh Press, even if the stricter criminal standards set forth in the cases referred to above are relied upon. Therefore, by any standard or measurement the record clearly establishes a violation of Section 8(j) of the Ordinance by the Press.

Petitioner has attacked the decision of the Commonwealth Court, construing it to hold that the use of gender interest column headings has a real and substantial relationship to the existence of a denial of employment opportunities to women on account of sex. In support of this argument, Petitioner has cited a number of cases that focus upon a statutorily mandated presumption of the ultimate fact upon which guilt is based as flowing naturally from a proven fact, lawful by itself, which the Courts held must be rationally connected to that ultimate conclusion. See *Tot. v. United States*, 319 U.S. 463 (1943), and other cases referred to at page 25 of Petitioner's Brief.

As before, however, the ultimate fact at issue is not whether there was a denial of employment opportunities to women, as prohibited by Section 8(a). Here, the ultimate fact upon which a violation of the Ordinance is founded is Petitioner's aid in the violation of Section 8(e): the publication of a discriminatory employment advertisement. Accordingly, the facts that were *proven* in this case are *themselves* violations of the Ordinance, and we need not proceed

further. These proven facts are *not* facts showing lawful conduct from which a presumption of an ultimate fact showing guilt need be drawn. The latter situation does not exist in this case, and to urge its consideration, as Petitioner has, is only to cloud an otherwise simple issue. As the Commonwealth Court recognized:

> "If the advertising column headings here are discriminatory, they are in violation of the Ordinance per se, and there need not be a specific 'particular' or an actual discrimination suffered by any particular woman. If discriminatory, the column headings were in violation before the first woman actually suffered any act of discrimination" (footnote omitted) (4 Pa. Commonwealth Ct. 460 (1972)).

One final point urged by the Pittsburgh Press deserves mention, if only because it vividly reveals both Petitioner's attitude toward sex discrimination and the reason why litigation was necessary to resolve the issues now before this Honorable Court. By way of explanation of its insistance upon the right to use gender interest headings in employment advertisements, Petitioner states that:

> ". . . the Press believes that the employment patterns in this country *generally* reflect job interest and qualification along sex lines." (Petitioner's Brief at 26.)

Clearly, it is Petitioner's belief in the existence of this state of affairs, and its blatant attempt to justify the immutability of these employment patterns that has given rise to the instant dispute. But to blindly

accept the permanence of this fact, as Petitioner apparently does, is to ignore the basic philosophy and thrust of the fair employment practices Ordinance of the City of Pittsburgh, the Pennsylvania Human Relations Act and Title VII of the United States Civil Rights Act of 1964. Certainly this country's employment patterns generally follow sex lines. That is precisely why the Pittsburgh Ordinance in question has, as its fundamental purpose, the eradication of the discriminatory employment practices that gave rise to this unfortunate situation. Certainly many southern school districts were racially segregated prior to this Court's ruling in *Brown v. Board of Education*, 347 U.S. 483 (1954). But can we say that this pattern of discrimination generally reflected the interest of the Black children who were placed in racially isolated academic surroundings?

Petitioner would have this Court uphold its sexual designation of employment column headings as ". . . a workable classification system [that] arises from the existing de facto division of employment between males and females in numerous different types of work." (Petitioner's Brief at 26-27). But the Supreme Court of Pennsylvania has firmly recognized that all discrimination is itself invidious regardless of its origin and despite the fact that it may have resulted from a de facto state of affairs. See *Pennsylvania Human Relations Commission v. Chester School District*, 427 Pa. 157, 233 A. 2d 290 (1967).

To reach a different conclusion would be tantamount to a condemnation of the concerted efforts of local, state and federal legislative bodies to eliminate

all remaining vestiges of sex discrimination in employment. It is urged that this Court reaffirm its determination that sex discrimination is an evil which must be eradicated. See *Reed v. Reed*, 404 U.S. 71 (1971).

## CONCLUSION

For the foregoing reasons, it is respectfully urged that the decision of the Commonwealth Court of Pennsylvania be affirmed.

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In The

# SUPREME COURT OF THE UNITED STATES

October Term 1972

NO. 72-419

PITTSBURGH PRESS COMPANY, *Petitioner*

v.

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS, ET AL.

## JOINT BRIEF OF AMICI CURIAE

AMERICAN VETERANS COMMITTEE, INC.;
WOMEN'S EQUITY ACTION LEAGUE LEGAL DEFENSE AND EDUCATIONAL FUND, INC.;
NATIONAL ASSOCIATION OF WOMEN LAWYERS;
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**PITTSBURGH PRESS COMPANY v. THE PITTSBURGH COMMISSION ON HUMAN RELATIONS, *et al.*, No. 72-419, October Term, 1972**

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**JOINT BRIEF OF AMICI CURIAE:**
**AMERICAN VETERANS COMMITTEE, INC.;**
**WOMEN'S EQUITY ACTION LEAGUE LEGAL DEFENSE AND EDUCATIONAL FUND, INC.;**
**NATIONAL ASSOCIATION OF WOMEN LAWYERS;**
**LEAGUE OF WOMEN VOTERS OF THE UNITED STATES.**

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## INTEREST OF THE AMICI CURIAE

The American Veterans Committee, Inc. (AVC) is a nationwide organization of veterans who served honorably in the Armed Forces of the United States during World War I, World War II, Korean Conflict and Vietnam Conflict, and who have associated themselves, regardless of race, color, religion, sex, or national origin, to promote the democratic principles which they fought to preserve. AVC was founded in 1943 and its membership includes both men and women who participate in AVC's affairs in full equality.

The Women's Equity Action League Educational and Legal Defense Fund, Inc. is the legal-aid arm of the Women's Equity Action League (WEAL), a nationwide organization of women and men, chiefly business and professional, organized "to promote greater economic progress on the part of American women and to press for enforcement of existing anti-discriminatory laws in behalf of women; to seek reappraisal of federal, state and local laws and practices limiting women's employment oppor-

tunities, and to combat job discriminations against women by all lawful means."

The National Association of Women Lawyers is a nationwide bar association of women judges and lawyers, organized in 1899 to "promote the welfare and interest of women lawyers; to maintain the honor and dignity of the profession of the law; to aid in enactment of legislation for the common good; and in the administration of such laws, to secure justice for all." NAWL has worked for many years to advance the legal and economic status of American women by expanding their opportunities to study and practice law, including aiding all women to establish and maintain their constitutional and statutory rights.

The League of Women Voters of the United States is a nonpartisan voluntary organization, open to all women citizens 18 years or older, which promotes informed and active participation by all citizens in government and politics. The League has 160,000 members in more than 1360 local leagues throughout the United States, Puerto Rico and the Virgin Islands.

The *amici* file this Joint Brief because they believe that sex segregation, like race segregation, of job ads produces many harms. *E.g.*, it reinforces ancient prejudices and stereotypes; obstructs equality of work opportunity; impedes numerous job seekers, including members of the *amici* organizations, in their search for employment; frustrates the objectives of fair employment laws; and undermines the national goals of maximum employment and maximum production.

## THE FACTS

In October 1969, the City of Pittsburgh's Human Relations Commission began investigation of charges that the Pittsburgh Press Company was violating the City's Human Relations Ordinance[1] by printing its classified job ads with sex-discriminatory labeling. The company publishes the Pittsburgh Press, a newspaper which has a circulation of about 350,000 daily and 750,000 on Sunday in the metropolitan area of Pittsburgh, Penn., and is the Nation's 12th largest newspaper in classified advertisements. The company also processes job ads as agent for the Pittsburgh Post-Gazette, which has a circulation of about 231,000 daily.

Prior to October 1969, the company printed many of its job ads with sex designations within the ad. Although

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[1]The City's Human Relations Ordinance, which established the Human Relations Commission in the Office of the Mayor, prohibits specified acts of discrimination on the basis of race, color, religion, ancestry, national origin, place of birth or sex, in connection with employment, housing, and public accommodations. (Ordinance 75, approved Feb. 28, 1967 (68 City Clerk's Records 511), as amended by Ordinance 395, approved July 7, 1969 (70 *Ibid.* 691), which added the prohibition against sex discrimination.) The Commission administers and enforces the Ordinance by several methods which are now customarily used by numerous State and local human relations commissions throughout the country; namely, studying human relations problems, issuing reports and publications, making recommendations to the Mayor and City Council, investigating and conciliating complaints of practices defined in the Ordinance as unlawful, certifying exemptions from the Ordinance, holding public hearings, making findings, and issuing cease and desist orders. If the Commission is unable to conciliate the case, it certifies violators of the Ordinance or the Commission's orders to the City Solicitor who then institutes court proceedings to secure enforcement or compliance or to impose a fine of not more than $300.

the job ads were classified alphabetically by occupation, they were segregated in columns captioned "Male Help Wanted," "Female Help Wanted," and "Male-Female Help Wanted." After conferences between the company and the Commission in October 1969, the company abandoned sex designations within the body of the job ad, and changed the column headings to "Jobs–Male Interest," "Jobs–Female Interest," and "Male-Female Help." It also printed a statement (at the beginning of the "male" ads and at the beginning of the "female" ads) asserting that the job ads are thus segregated "for the convenience of our readers."[2]

In printing its job ads, the company made no inquiry as to whether the employer was exempt from the Ordinance, or whether the Commission had exempted the occupation or position by a certificate of exemption under section 7(d) of the Ordinance, as one which "reasonably requires the employment of a person or persons of a particular . . . sex."

After due hearing, the Commission ruled that the company's current method of printing its classified job ads violates the Ordinance. The Commission's reasoning was as follows:

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[2]The full statement read:

"Notice to Job Seekers"—Jobs are arranged under Male and Female classifications for the convenience of our readers. This is done because most jobs generally appeal more to persons of one sex than the other. Various laws and ordinances—local, state, and Federal—prohibit discrimination in employment because of sex unless sex is a bona fide occupational requirement. Unless the advertisement itself specifies one sex or the other, job seekers should assume that the advertiser will consider applicants of either sex in compliance with the laws against discrimination."

1. Section 8(e) of the Ordinance makes it an unlawful employment practice for any employer, employment agency, or labor organization to "publish or circulate, or to cause to be published or circulated, any notice or advertisement relating to employment or membership which indicates any discrimination because of race, color, religion, ancestry, national origin, place of birth, or sex"; and

2. Section 8(j) of the Ordinance makes it an unlawful employment practice for "any person, whether or not an employer . . . to aid, incite, compel, coerce or participate in the doing of any act declared to be an unlawful employment practice, or to obstruct or prevent any person from . . .complying with . . .this Ordinance . . ."

3. The company's "classification system of employment advertisements with captions containing designations as to sex" aided or compelled the advertiser to use publication of job ads indicating sex differences in jobs, without a certificate of exemption for the advertiser position, and thus violated section 8(j) of the Ordinance.

The Commission issued a cease-and-desist order that Company's classification system of employment ads shall contain "no reference to sex". The company appealed to the Pennsylvania Court of Common Pleas of Allegheny County, which affirmed the Commission's order. On further appeal, the Commonwealth Court of Pennsylvania modified the Commission's order to require company to exclude "all reference to sex in employment advertising column headings except as may be exempt under said Ordinance, or as may be certified as exempt by said Commission." 4 Pa. Cmwlth. 448, 287 A.2d 161 (1972). The Pennsylvania Supreme Court,

without opinion, denied the company's petition for allowance of appeal. This Court granted the company's petition for certiorari on December 4, 1972.

## SUMMARY OF ARGUMENT

Sex segregation, like race segregation, of classified job ads reinforces prejudice and frustrates the objectives of a fair employment law. Many newspapers recognize this and have switched to classifying their job ads solely by occupation. Sex segregation of job ads does not serve the convenience of the job seeker. On the contrary, it discourages job seekers, is harmful to employers' and employment agencies' efforts to comply with the law, fosters substantial sex discrimination in employment, and impairs the earning ability of many women (and also of men). The City Council's prohibition against discriminatory job advertising, as applied to the Petitioner newspaper company, simply regulates the commercial activity of selling advertising space. The prohibition is rationally related to the valid objective of stopping unlawful discriminatory practices, imposes little or no burden on the newspaper, and does not abridge its freedom of speech or press. It is therefore a valid legislative enactment. The Petitioner's "due process" argument misapprehends the basis of the lower court's order, and the Petitioner was not denied due process.

## I. THE STATUTORY PROHIBITION AGAINST DISCRIMINATORY JOB ADS IS RATIONALLY RELATED TO THE LEGISLATIVE OBJECTIVE OF STOPPING UNLAWFUL DISCRIMINATORY EMPLOYMENT PRACTICES AND IS THEREFORE A VALID LEGISLATIVE ENACTMENT.

The basic purpose of the Pittsburgh Ordinance is to eliminate discrimination based on race, religion, sex, etc., in employment, housing, and public accommodations. It is now indisputable that, under our Constitution, a government may "choose to put its authority behind one of the cherished aims of American feeling by forbidding indulgence in racial or religious prejudice to another's hurt," *Railway Mail Ass'n.* v. *Corsi,* 326 U.S. 88, 98 (1945) (Frankfurter, J.), and that unless restricted by State law such legislation is within the police power of a municipality. *District of Columbia* v. *Thompson Co.,* 346 U.S. 100, 109 (1953); *Bob-Lo Excursion Co.* v. *Michigan,* 333 U.S. 28, 34 (1948). This Constitutional policy against invidious discrimination is not restricted simply to discrimination based on race or religion – it applies also to discrimination based on sex. *Reed* v. *Reed,* 404 U.S. 71 (1971); *Phillips* v. *Martin-Marietta Corp.,* 400 U.S. 542 (1971); *Weeks* v. *Southern Bell Tel. & Tel. Co.,* (CA 5) 408 F.2d 228 (1969) and 467 F.2d 95 (1972).

Furthermore, in legislating against such discriminatory activities, the legislature may prohibit or regulate advertising practices which the legislature reasonably and rationally believes will promote or exacerbate the problems against which the legislation is validly directed. *Railway Express Agency* v. *New York,* 336 U.S. 106, 108-109 (1949); *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 491 (1955); *Head* v. *New Mexico Board of Examiners,* 374 U.S. 424 (1963).

Accordingly, Congress, many States, the District of Columbia, Puerto Rico, and various municipalities, including Pittsburgh, have enacted laws and ordinances which prohibit discrimination in employment based on "race, color, religion, sex or national origin", and most of these, including the Federal Civil Rights Act of 1964 (Section 704(b) of Title VII; 42 U.S.C. 2000e-3(b)) prohibit discriminatory job advertising.[3]

The Pittsburgh Ordinance, like the other laws and ordinances, draws no distinction between the word "sex" and the words "race, color, religion or national origin", unless it is shown in "certain instances" that the factor of sex[4] is a bona fide occupational qualification (BFOQ) "reasonably necessary to the normal operation of that particular business or enterprise". (42 U.S.C. 2000e-2(e); sec. 7(d) of the Pittsburgh Ordinance). However, the BFOQ exception is so narrowly limited that hardly any job may lawfully be restricted to one sex on that basis.

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[3] At least 33 of the 37 States, the District of Columbia and Puerto Rico which prohibit sex discrimination in employment also prohibit sex discriminatory job advertising. See Appendix of this Brief, *post*; and U.S. Dept. of Labor, Women's Bureau, "Laws on Sex Discrimination in Employment" (1970), supplemented to May 1, 1972. Hundreds of cities and counties have human relations commissions operating under a wide variety of nondiscrimination ordinances, many of which prohibit sex discrimination in employment, including sex discriminatory advertising. Examples of the latter are: New York City Administrative Code, Law on Human Rights, as amended May 1972, sec. B1-7.0, ¶¶1(d), 1a(d) and 6; Minneapolis, Minn., Ord. adopted Nov. 23, 1971; Baltimore Ord. 103, 1963-64, as amended, sec. 10(3)(iii); and the Pittsburgh Ordinance in this case.

[4] Religion and national origin (but not race or color) may also be a BFOQ.

Thus, the Guidelines of the Equal Employment Opportunity Commission (EEOC) specifically declare that the BFOQ exception does not warrant sex discrimination in employment "based on assumptions of the comparative employment characteristics of women in general" (*e.g.* turnover rates), or "on stereotyped characterizations of the sexes" (*e.g.*, assembling skills, aggressiveness), or "because of preferences of coworkers, the employer, clients or customers."[5] Indeed, the EEOC recognizes sex as a BFOQ only where it is essential for authenticity (*e.g.*, actor, actress),[6] or required under current community standards of morality or propriety (e.g., ladies' or men's room attendant, fitter of feminine intimate apparel),[7] or for performance of the job (*e.g.*, wet-nurse).[8]

The EEOC initially allowed sex headings on classified job ad columns (31 F.R. 6414, April 28, 1966). But after conducting extensive hearings in May 1967 and experiencing the discriminatory effects of such sex headings, the EEOC amended its Guidelines on sex discrimination in August 1968 (33 F.R. 11439) to

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[5] 29 C.F.R. 1604.2; 37 F.R. 6835 (April 5, 1972).

[6] *Ibid.*, sec. 1604.2(a)(2). The EEOC Guidelines are accorded great weight. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434 (1971); *Phillips* v. *Martin-Marietta Corp.*, 400 U.S. 542, 545 (1971) (Marshall, J.); *Weeks* v. *Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (CA 5, 1969); *Bartmess* v. *Drewrys U.S.A.*, 444 F.2d 1186, 1190 (CA 7, 1971); *Rosenfeld* v. *So. Pac. Co.*, 441 F.2d 1219 (CA 9, 1971); *Local 189, United Papermakers, etc.* v. *United States*, 416 F.2d 980, 997 (CA 5, 1969).

[7] EEOC, "Toward Job Equality for Women," p. 5 (1969).

[8] See *Diaz* v. *Pan American World Airways, Inc.*, 442 F.2d 385 (CA 5, 1971), *cert. den.*, 404 U.S. 959 (1971) (female sex not essential for job of flight cabin attendant, *i.e.*, stewardess).

prohibit the "placement of an advertisement in columns classified by publishers on the basis of sex, such as columns headed 'Male' or 'Female' . . ." (29 C.F.R. 1604.5, as reaffirmed on April 5, 1972, 37 F.R. 6835).[9] Shortly thereafter, a Federal court ruled that this EEOC Guideline "represents a reasonable interpretation of section 704(b) of Title VII." *American Newspaper Publishers Association* v. *Alexander*, 294 F. Supp. 1100, 1103 (D. D.C. 1968). The Labor Department's Office of Federal Contract Compliance, which administers Executive Orders 11246 (30 F.R. 12319) and 11375 (32 F.R. 14303) prohibiting discrimination in employment by those holding Federal contracts, issued Sex Discrimination Guidelines in June 1970 containing an

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[9]The Pennsylvania Human Relations Commission, which administers the State's Human Relations Act (43 Purdon's Penn. Stats. Ann. sec. 955) issued the following Guideline (1 Pa. Bull. 2359, sec. 2; CCH-Employment Practices Guidelines ¶27,296.02 (A)):

"Sec. 2. Discrimination in Employment.–(A)§5(b)(2) provides that it shall be an unlawful practice to publish any advertisement indicating any preference, limitation, specification or discrimination based on sex. The placement of an advertisement seeking applicants for employment in a classified advertisement section under "Help Wanted–Male," or "Help Wanted–Female Interest" or similar columns with a sex designation is considered to be a violation of §5(b)(2) if an employer is covered by the Act and has not received a bona fide occupational qualification exemption from the Commission.

"The mere fact that the newspaper or magazine publishing such advertisements publishes a disclaimer provision advising that applicants of one sex should assume that applicants of either sex will be considered for employment is not considered by the Commission to be a defense to a complaint alleging a violation of §5(b)(2)."

identical prohibition. 41 C.F.R. 60-20.2(b); 35 F.R. 8888.

The Civil Rights Act of 1964 prohibits discriminatory job advertising solely by employers, employment agencies and labor organizations.[10]

However, the City of Pittsburgh's ordinance, like the laws and ordinances of many States and other municipalities, went further than the Federal statute, by prohibiting *any person* from aiding, coercing or participating in publication of the discriminatory job ad. As shown in Part I, A and B, below, this is a reasonable and rational prohibition directly related to the proper statutory objective of eliminating discrimination in employment and is therefore a valid legislative enactment. (Parts II and III deal separately with the Petitioner's First Amendment and Due Process arguments.)

**A. Employment advertising under sex-labeled headings reinforces sex prejudice and frustrates the objectives of a fair employment law.**

Help-wanted classified advertisements in newspapers constitute a major vehicle for bringing together the job and the job-seeker. They are the single most comprehensive information source on current job openings and the most productive of advertising media

[10] Efforts to apply the advertising prohibition to newspapers on the theory that printing classified job ads makes them employment agencies have had mixed results. *Cf. Brush* v. *San Francisco Newspaper Printing Co.*, 315 F. Supp. 577 (D.C. N.D. Calif. 1970), *aff'd.* 469 F.2d 89 (CA 9, Sept. 19, 1972), *Pet. for cert.* pending No. 72-880; *Morrow* v. *Mississippi Publishers Corp.*, 5 FEP Cases 287 (D.C. S.D. Miss., Nov. 27, 1972).

for filling most types of positions.[11] It is now generally accepted that racial or religious labeling of job ads (*e.g.*, "whites only", "blacks need not apply", "no Jews", "colored jobs", "Italian-Americans not acceptable", etc.) impairs the equal employment opportunities of those excluded. Indeed, the Petitioner's Brief (p. 26) states: "We do not contend that employment opportunities are *generally* classifiable along racial or nationality lines." But the Petitioner then goes on to say: "On the other hand, the Press believes that the employment patterns in this country *generally* reflect job interest and qualifications along sex lines." (Emphases by Petitioner.)

We believe that the law was specifically intended to counteract such stereotypes and resulting discrimination in employment, based on sex as well as on race or national origin.

Sex designations, whether in the ad, or as captions on the columns of classified job ads segregated by sex, channel applicants into the jobs labeled for their respective sex. The long standing customs and stereotypes about "men's work" and "women's work", and the traditional prejudices limiting women to the less rewarded and less rewarding kinds of work, reinforce the ads' message of sex selection. The heading "male" or "men wanted" clearly conveys only one meaning–that the advertiser of the jobs under that heading wants men only. Similarly, the heading "female" or "women wanted" clearly says that the jobs in the ads under that heading are for women only.

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[11] Testimony of Frank Coss, Federal Communications Commission Docket 19143, August 1, 1972, *re* Bell Telephone Company discriminatory employment practices (See Cong. Rec. of Feb. 17, 1972, pp. E1243-E1272). See ftnt. 20, *infra.*

Nor does the Petitioner's "Notice to Job Seekers" (ftnt. 2, *supra*), proclaiming that the job seeker "should assume that the advertiser will consider applicants of either sex", lessen the message of sex discrimination. In *Hailes* v. *United Air Lines*, 464 F.2d 1006, 1009 (CA 5, 1972), the Court ruled:

> "Despite the fact that the ad states that United is an Equal Opportunity Employer, the tendentious selection of the feminine term, 'stewardess', *and the placing of the ad in the 'Help Wanted – Female'* column without a corresponding ad in the 'Help Wanted – Male' column *so plainly indicates a preference for females it cannot be neutralized* by the self-conferred title of 'Equal Opportunity Employer". (Emphasis supplied).

It is plain that placing an employment ad under a sex-segregative heading negates any assurance to the job seeker that the advertiser will consider him or her for employment without regard to his or her sex.

Furthermore, several studies show that the job seeker is substantially deterred from reading the job ads in columns whose headings refer to the other sex, and that the better jobs (in pay, fringe benefits, opportunity for advancement, etc.) are generally listed in the "male" columns.[12] Indeed, the Court of Common Pleas found, on the basis of evidence presented to the Pittsburgh

[12] Hearings on Section 805 of H.R. 16098 before Special Subcommittee on Education of House Committee on Education and Labor, 91st Cong., part 2, pp. 889-896 (1970); Pennsylvania Department of Public Instruction, "Training the Woman to Know Her Place: The Social Antecedents of Women in the World of Work" (1971); Testimony of Frank Coss, *supra*, ftnt. 11; Testimony of Dr. G.H.F. Gardner, Hearings on Sex Discriminatory Guidelines of Office of Federal Contract Compliance, August 6, 1969.

Commission on Human Relations in this case, "that the more attractive employment opportunities consistently appear in the male classification" and "that the classification system used by the [Pittsburgh] Press discourage [sic] women from application for jobs classified for male interest." (App., Pet. for Writ of Certiorari, p. 33a).

Thus, the presence of sex preferences in a newspaper's classified job ads reinforces traditional prejudices and stereotypes about the kinds of jobs that are suitable for men and those suitable for women, and makes it harder for the community to accept and comply with the nondiscrimination policy of the law. As this Court pointed out in *Anderson* v. *Martin*, 375 U.S. 399, 402 (1964), the label "furnishes a vehicle" both for arousing prejudice and for stimulating discriminatory action.

The Economic Report of the President (H. Doc. 93-28), transmitted to Congress on January 31, 1973 (Cong. Rec. S1522, H604), noted that the goals of "maximum employment" and "maximum production" of the Employment Act of 1946 (60 Stat. 23, 15 U.S.C. 1021) apply "equally to men and women". Chap. 4, p. 89. However, it stated:

> Although the goals apply equally to men and women, some of the obstacles to their achievement apply especially to women. Women have gained much more access to market employment than they used to have, but they have not gained full equality within the market in the choice of jobs, opportunities for advancement, and other matters related to employment and compensation. To some extent the cause of this discrepancy is direct discrimination. But it is also the result of more subtle and complex factors originating in cultural

patterns that have grown up in most societies through the centuries. In either case, because the possibilities open to women are restricted, they are not always free to contribute a full measure of earnings to their families, to develop their talents fully, or to help achieve the national goal of "maximum production." [p. 90].

Women have generally experienced more unemployment than men and this differential has been more pronounced in recent years . . . [p. 96]

. . . The unemployment of women who seek work is costly, to themselves, their families, and the Nation. Our goal should be to reduce this unemployment wherever that can be done by means which are not themselves more costly. [p. 99].

The discrimination inherent in sex-segregated job ads has been a major influence in maintaining the sex-based discriminations which still pervade our country, despite the promise of the Equal Pay Act of 1963 (77 Stat. 56, 29 U.S.C. 206(d)), prohibiting sex discrimination in wage payments, and Title VII of the Civil Rights Act of 1964 (78 Stat. 241, 42 U.S.C. 2000e), prohibiting discrimination in employment on the basis of race, color, religion, sex or national origin. About one-fourth of all employment discrimination complaints received by the EEOC are sex-based.[13] These discriminations are largely responsible for the earnings gap between the 36,132,000 male, and the 15,476,000 female, full-time, year-round workers, as shown by the following earnings data reported for such workers during 1970 by the Labor

[13] Equal Employment Opportunity Commission, 6th Annual Report (F.Y. 1971), p. 1.

Department, Employment Standards Administration, Women's Bureau:[14]

TABLE I– Median Earnings, 1970

| | Men | Women | Women's earnings as percent of men's |
|---|---|---|---|
| All workers | $ 8,966 | $ 5,323 | 59.4 |
| Professional and technical | 11,806 | 7,878 | 66.7 |
| Non farm managers, officials, proprietors | 12,117 | 6,834 | 56.4 |
| Clerical | 8,617 | 5,551 | 64.4 |
| Sales | 9,790 | 4,188 | 42.8 |
| Service (excluding household) | 6,955 | 3,953 | 56.8 |

This gap is also shown in the distribution of such workers in 1970 by earning levels, as follows:

| TABLE II– | Men | Women |
|---|---|---|
| Earning less than $7,000 | 30.1 percent | 73.9 percent |
| Earning $15,000 or over | 13.5 percent | 1.1 percent |

This gap is not due to differences in education or qualification, but exists at every level of educational background as follows:

[14] Fact Sheet on the Earnings Gap, Dec. 1971 (rev.), based on Bureau of the Census Current Population Reports (P-60).

TABLE III—

Median earnings, 1972

| Years schooling completed | Men | Women | Women's median income as percent of men's |
|---|---|---|---|
| Elementary school . . | $ 7,535 | $4,181 | 55.5 |
| High School: 1-3 years | 8,514 | 4,655 | 54.7 |
| 4 years | 9,567 | 5,580 | 58.3 |
| College: 1-3 years . . | 11,183 | 6,604 | 59.1 |
| 4 years . . . | 13,264 | 8,156 | 61.5 |
| 5 years or more | 14,747 | 9,581 | 65.0 |

This gap, says the Labor Department, is not necessarily due to women "receiving unequal pay for equal work," but rather because "women are more likely than men to be employed in low-skilled, low-paying jobs." (*Ibid.*, p. 4). The immensity of this sex-based discrimination is dramatized by the above figures which show that in 1970 males who dropped out of high school after their first, second or third year had higher median annual earnings ($8,514) than women with four full years of college education ($8,156), and males with only an elementary school education had higher median annual earnings ($7,535) than females with 1-3 years of college education ($6,604).

By channeling women into the lower paying jobs and reinforcing sex prejudice in employment, the sex-segregated job ads frustrate the basic objective of the fair employment laws.

The situation is similar to that which existed, not long ago, in interstate transportation. Although this Court had repeatedly ruled that racial segregation on common

carriers in interstate transportation was illegal,[15] the continued widespread use of "white only" and "colored only" signs in railroad and bus stations made this Court's decisions "only a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." *Edwards* v. *California*, 314 U.S. 160, 186 (1941). Effective desegregation in interstate transportation facilities began only when the Interstate Commerce Commission issued its regulations in September 1961 (49 CFR 180a.1-10) requiring motor common carriers to display nonsegregation signs and to refrain from using terminals having signs specifying race segregation practices. *Georgia* v. *United States*, 201 F. Supp. 813 (D.C. N.D. Ga. 1961), *affd.* 371 U.S. 9 (1962).

The legislature could reasonably believe that discriminatory job ads promote discrimination in employment, and its determination to prohibit the publication of such ads is a reasonable and rational means for effectuating the proper legislative objective of reducing job discrimination.

**B. There is no merit in the petitioner's suggestion that sex-segregated job ads promote the convenience of the job seeker.**

The company attempts to justify its sex-segregated job ads policy by contending (p. 10, Petitioner's brief on Petition for Writ of Certiorari) that its sex-segregated column headings "are solely a reflection of what it believes to be in futherance of the most convenient classification for its readers, what is preferred by its

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[15] *Mitchell* v. *United States*, 313 U.S. 80 (1941); *Morgan* v. *Virginia*, 328 U.S. 373 (1946); *Henderson* v. *United States*, 339 U.S. 816 (1950).

readers, and is [sic] a classification which has a rational basis in that it merely reflects the present dominant employment interest patterns of the sexes."

It was only a short time ago that many newspapers in this country arranged their classified ads on jobs and housing under race labels, and offered precisely the same argument (substitute "race" for "sex") to justify their race-segregated classified ads. Such argument was without merit then, and it should be summarily rejected in this case.

There is much similarity between race discrimination and sex discrimination in employment. The attitudes underlying both types of discrimination have generally reflected the ancient canard about the "inferiority" of women and Negroes (or Oriental, or other proscribed races).[16] Both women and racial minorities are "easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws." *Hernandez* v. *Texas*, 347 U.S. 475, 478 (1954). Both are grossly underrepresented in Federal, State, and local formal decision-making processes, leaving both easy targets of public and private discrimination. The history of both women and racial minorities has been marked by unduly slow progress toward legal, economic, and political equality, often in the face of considerable resistance from the dominant group. The result has been that women and racial minorities have often been consigned to the bottom of the economic ladder, in the lowest paying, least satisfying, jobs.

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[16] *E.g.*, Gunnar Myrdal, *An American Dilemma*, Appendix 5, pp. 1073-1078 (1944); H.M. Hacker, "Women as a Minority Group," 30 *Social Forces* 60 (Oct. 1951) (reprints available from U.S. Women's Bureau).

The similarity between race discrimination and sex discrimination was pithily stated by the Supreme Court of California in *Sail'er Inn, Inc.* v. *Kirby*, 5 Cal. 3d 1, 18-20, 485 P. 2d 529, 540-41 (1971):

> Sex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth. What differentiates sex from non-suspect statuses, such as intelligence or physical disability, and aligns it with the recognized suspect classifications is that the characteristic frequently bears no relation to ability to perform or contribute to society. . . . The result is that the whole class is relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members. . . . Where the relation between characteristic and evil to be prevented is so tenuous, courts must look closely at classifications based on that characteristic lest outdated social stereotypes result in invidious laws or practices.
>
> Another characteristic which underlies all suspect classifications is the stigma of inferiority and second class citizenship associated with them. . . . Women, like Negroes, aliens, and the poor have historically labored under severe legal and social disabilities. . . . They are excluded from or discriminated against in employment and educational opportunities. . . .
>
> Laws which disable women from full participation in the political, business and economic arenas are often characterized as "protective" and beneficial. Those same laws applied to racial or ethnic minorities would readily be recognized as invidious and impermissible. The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage. We conclude that the sexual classifications are properly treated as suspect, particularly when those classifications are

made with respect to a fundamental interest such as employment.

The President"s Task Force on Women's Rights and Responsibilities, citing Census Bureau data, stated in its Report of April 1970, "A Matter of Simple Justice", p. 18:

> Sex bias takes a greater economic toll than racial bias. The median earnings of white men employed year-round full-time is $7,396, of Negro men $4,777, of white women $4,279, of Negro women $3,194. Women with some college education both white and Negro, earn less than Negro men with 8 years of education.
>
> Women head 1,723,000 impoverished families, Negro males head 820,000. One-quarter of all families headed by white women are in poverty. More than half of all headed by Negro women are in poverty. Less than a quarter of those headed by Negro males are in poverty. Seven percent of those headed by white males are in poverty. [Footnotes omitted].

Sex-segregated job ads, like race-segregated job ads, do not promote the convenience of the job seeker, except in a community dedicated to unequal job opportunities. This has been amply demonstrated by experience with regard to racial discrimination in employment. It is equally true with regard to sex discrimination.

*First.* Grouping job ads by sex promotes only the continuance of the tradition that the jobs listed as "Male interest" are not intended for women, and vice versa. It does not promote the convenience of the man or woman who is seeking a job (e.g., as bookkeeper, plumber, cook, welder, printer, secretary, accountant, or other jobs that can be performed by men and women alike and for which

sex is not a bona fide occupational qualification). The job seeker's interests would be promoted far more by grouping the ads solely by job category – so that he or she can pursue all opportunities for the kind of job he or she wants – rather than by a sex label which automatically discourages persons of the other sex from reading the job ads under such sex label. Indeed, if the job seeker, following the Petitioner's suggestion to "assume that the advertiser will consider applicants of either sex" ("Notice to job seekers", ftnt. 2, *supra*), consults both the "Male" and "Female" columns, what then is the point of the sex-segregated job columns?

The grouping of ads alphabetically by occupation without sex-segregated headings is better for the job seeker even in the infrequent case where (a) an employer or employment agency is exempt from the Ordinance, or (b) the position is exempted because it "reasonably requires the employment of a person or persons of a particular . . . sex" (Ordinance, sec. 7(d)). In such cases, the exempted ad, printed with others arranged alphabetically by job title, need simply include the sex designation in the body of the ad. The job seeker could ckeck all ads for the occupation he or she seeks (for bookkeeper, plumber, cook, nurse, etc.) in one place, including the exempted jobs, rather than have to check for such ads in 2 or 3 separate columns.

Furthermore, many (but not all) employers and employment agencies now place duplicate job ads in both the male and female columns in order to avoid a judgment that they discriminate on the basis of sex. *Cf. Hailes* v. *United Air Lines, supra.* The job seeker who wants to check on all jobs for which he or she may be interested in applying must therefore look through longer series of ads in both columns. The Petitioner's assertion

that the sex labeled columns serve the "convenience" of the job seeker is therefore quite hollow. Only when *all* advertisers duplicate their job ads would sex-segregated columns reduce the job seeker's reading burden.

It is, of course, apparent that such duplication in 2 or 3 columns imposes extra expense on those employers and employment agencies that desire to reach both male and female job seekers without discrimination,[17] and that they would be better served if all job ads were arranged alphabetically by job category without sex segregation.

*Second.* The Court of Common Pleas below found that the evidence presented to the Pittsburgh Human Relations Commission "clearly established that it is not the preference of the reader, but the preference of the prospective employer which dictate [sic] ad placement under one caption or another" and "that the system which the Press seeks to sustain does aid in discrimination in employment based upon sex, and not based upon difference in treatment sanctioned by the law." App., Pet. for Writ of Certiorari, pp. 33a, 34a. The Commonwealth Court below found (*Ibid.*, p. 58a): "The record clearly demonstrates that this sex segregated system of want ad column classification is geared primarily to the interests and desires of employers."

In providing to employers and employment agencies the means of violating the law's prohibition against publishing sex discriminatory job ads, the Petitioner supports a widespread system of violations by such job

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[17] In this case, the Court of Common Pleas found: "The evidence before the Commission establishes that at least one customer had increased costs of advertising because of duplication of ads in both male and female columns." App., Pet. for Writ of Certiorari, p. 33a.

advertisers. The multiplicity of such violations imposes on the meagerly staffed City, State and Federal commissions an administratively impossible burden of law enforcement. The only effective remedy available to the law is to prevent the central figure–the newspaper–from aiding, inciting (and indeed often coercing) the employers and employment agencies to publish the discriminatory job advertisements which undermine the law's basic purpose of combatting discrimination in employment.

*Third.* The Petitioner's contention assumes that the newspaper's ad-takers or management know (a) what jobs are preferred by its readers, and (b) what are the "dominant employment interest patterns of the sexes". We submit that they are not so prescient. According to Census Bureau publications,[18] there were, in 1970, 49,549,239 males, and 30,501,807 females, in the civilian labor force, 16 years old and over, of whom 47,623,754 males, and 28,929,845 females, were employed. Their jobs refute much of the mythology about the "employment interest patterns of the sexes." In large numbers, women now work in traditional "men's jobs," and men now work in traditional "women's jobs." Some examples are:

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[18] *1970 Census of Population*, PC(1)-C1, General Social and Economic Characteristics, U.S. Summary, Table 112, p. 1-418 (June 1972); *Ibid.*, PC(2)-7C, Occupation by Industry, Table 8, pp. 241-248 (October 1972).

TABLE IV– FEMALE WORKERS

| | Number of female workers |
|---|---|
| engineers | 19,577 |
| lawyers | 12,311 |
| physicians, dentists, optometrists, veterinarians, etc. | 45,664 |
| clergymen* | 6,237 |
| urban and regional planners | 1,099 |
| engineering and science technicians | 87,837 |
| draftsmen* | 22,257 |
| air traffic controllers | 1,370 |
| airplane pilots[19] | 710 |
| flight engineers | 164 |
| mail carriers, post office | 19,566 |
| insurance adjusters and investigators | 25,570 |
| blacksmiths | 249 |
| boilermakers | 371 |
| bulldozer operators | 1,135 |
| carpenters | 10,978 |
| cranemen*, derrickmen*, and hoistmen* | 1,939 |
| electricians | 8,616 |
| electric power linemen*, and cablemen* | 1,444 |
| excavating, grading and road machine operators, except bulldozers | 2,495 |
| forgemen* and hammermen* | 724 |
| locomotive engineers | 392 |
| locomotive firemen* | 151 |
| machinists | 11,754 |
| automobile mechanics | 11,045 |
| automobile body repairmen* | 1,332 |
| heavy equipment mechanics, including diesel | 10,713 |
| data processing machine repairmen* | 864 |
| railroad and car shop mechanics and repairmen* | 510 |
| metal molders | 5,749 |
| construction and maintenance painters | 13,303 |
| plumbers and pipefitters | 4,110 |
| pressmen* and plate printers | 13,346 |
| sheetmetal workers and tinsmiths | 2,898 |
| shipfitters | 123 |
| shoe repairmen* | 6,343 |
| stone cutters and carvers | 445 |

*All these "men" were females.

[Table continued on next page]

[19] On January 10, 1973, the Navy announced selection of 8 women to begin flight cadet training to become pilots of Navy transport planes and helicopters. *Washington Post*, p. A-7 (Jan. 11, 1973).

## FEMALE WORKERS (Continued)

| | Number of female workers |
|---|---|
| structural metal craftsmen* | 868 |
| telephone installers and repairmen* | 8,285 |
| telephone linemen* and splicers | 756 |
| blasters and powdermen* | 311 |
| chainmen,* rodmen,* and axmen,* surveying | 163 |
| drillers, earth | 3,405 |
| furnacemen,* smelter-men* and pourers | 2,761 |
| garage workers and gas station attendants | 12,084 |
| meatcutters and butchers | 28,054 |
| metal platers | 2,828 |
| mine operatives | 3,359 |
| drill press operatives | 14,831 |
| lathe and milling machine operatives | 7,566 |
| punch and stamping press operatives | 48,377 |
| riveters and fasteners | 10,941 |
| sailors and deckhands | 466 |
| stationary firemen* | 4,813 |
| welders and flamecutters | 31,273 |
| Boatmen* and Canalmen* | 324 |
| bus drivers | 66,000 |
| deliverymen* and routemen* | 19,691 |
| railroad brakemen* | 537 |
| railroad switchmen* | 867 |
| truck drivers | 20,120 |
| construction laborers, except carpenter helpers | 9,571 |
| fishermen* and oystermen* | 1,147 |
| freight and material handlers | 38,760 |
| longshoremen* and stevedores | 705 |
| lumbermen,* raftsmen* and woodchoppers | 1,766 |
| janitors and sextons (Does not include cleaners and charwomen) | 156,755 |
| busboys* | 13,528 |
| crossing guards and bridgetenders | 23,919 |
| firemen,* fire protection | 1,976 |
| guards and watchmen* | 16,262 |
| policemen* and detectives | 13,098 |

*All these "men" were females.

TABLE V– MALE WORKERS

| | Number of male workers | | Number of male workers |
|---|---|---|---|
| dieticians | 3,222 | chambermaids** and maids**, except private household | 10,107 |
| registered nurses | 22,332 | | |
| secretaries | 64,066 | cooks, except private household | 305,492 |
| stenographers | 8,082 | | |
| typists | 56,834 | lay midwives** | 138 |
| decorators and window dressers | 29,709 | practical nurses | 8,485 |
| | | airline stewardesses** | 1,364 |
| dressmakers and seamstresses,** except factory | 4,706 | child care workers, except private household | 9,196 |
| milliners | 183 | hairdressers and cosmetologists | 46,663 |
| sewers and stitchers | 54,686 | | |
| weavers | 23,461 | housekeepers, except private household. | 29,076 |

**All males, the word notwithstanding.

These samplings show that the "employment interest patterns of the sexes" are far more varied than the traditional stereotypes. They also show that the assumptions underlying the newspaper company's efforts to direct job seekers into particular kinds of employment are contrary to the employment interests of large numbers of men and women (just as the race-segregated job ads formerly prevalent were contrary to the employment interests of many whites and Negroes.)

This is being increasingly understood by newspapers throughout the country. The following newspapers, which formerly published sex-segregated job ads, now print "help wanted" columns without sex segregation of the job ads:[20]

[20] Some of these newspapers changed voluntarily before, and some after, the EEOC in 1968, and then various State commissions, adopted Guidelines prohibiting placement of job ads in sex-labeled classified ad columns. See text and ftnt. 9, *supra*; and

[Footnote continued on next page]

TABLE VI– Newspapers no longer printing sex-segregated classified job ads.

Albany Times Union
Atlanta Constitution
Baton Rouge (La.) State Times
Bergen (N.J.) Record
Bismarck (N. Dak.) Tribune
Boston Globe
Charleston (W. Va.) Gazette
Chicago Sun Times
Cleveland Plain Dealer
Cleveland Press
Commercial Appeal (Tenn.)
Dayton Daily News
Deseret (Utah) News
Des Moines Register
Detroit News
Florida Times Union
Honolulu Star Bulletin
Houston Post
Indianapolis News
Kansas City Star
Los Angeles Times
Miami Herald
Minneapolis Star Tribune
Newark Evening News
Newark Star Ledger
Newsday (L.I., N.Y.)
New York Daily News
New York Law Journal
New York Post
New York Times
News and Courier (Charleston, S.C.)
Oakland (Calif.) Tribune
Omaha World Herald
Oregonian
Portland (Maine) Press
Providence (R.I.) Journal
Red Bank (N.J.) Daily Register
St. Louis Post Dispatch
St. Petersburg Times
San Francisco Chronicle
Seattle Times
Tampa Tribune
Times Picayune (La.)
Virginia Pilot (Norfolk, Va.)
Waco (Tex.) Tribune-Herald
Wall Street Journal
Washington Evening Star
Washington Post
Wilmington (Del.) Evening Journal

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Appendix of this Brief, *post.* Others changed pursuant to orders from State Commissions. *E.g., Hinfrey* v. *Red Bank Register* (E13BS-4806, N.J. Dept. of Law & Pub. Safety, Div. on Civ. Rts., Oct. 27, 1971); *Commission* v. *Evening Sentinel* (FEP-Sex 1-5, 29-1, Conn. Comm. Hum. Rts., June 30, 1972); Order, Iowa Civ.

[Footnote continued on next page]

The lesson of these facts is clear: The sex-labeled headings on job ad columns simply permit (or force) the advertisers to sex-label their help-wanted ads in defiance of the nondiscrimination law. Such classified ads aid and coerce the commission of the unlawful employment practices prohibited by the Ordinance.

## II. THE PITTSBURGH ORDINANCE AS ENFORCED BY THE COURT BELOW – REQUIRING THE PETITIONER TO CEASE SEX-SEGREGATED LABELING FOR JOB ADS IN ITS NEWSPAPER UNLESS THE ADVERTISER OR POSITION IS EXEMPT UNDER THE ORDINANCE – REGULATES THE COMMERCIAL ACTIVITY OF SELLING ADVERTISING SPACE, IMPOSES LITTLE OR NO BURDEN ON THE PETITIONER, AND DOES NOT ABRIDGE FREEDOM OF SPEECH OR OF THE PRESS WITHIN THE MEANING OF THE FIRST AMENDMENT.

The basic purpose of the Pittsburgh Ordinance is to eliminate discrimination based on race, religion, sex, etc., in employment, housing, and public accommodations. To

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Rts. Comm., Labor Rel. Rep., FEP 451:407, 1972. Some may have been persuaded by economic or other reasons. *E.g.*, the Bell System telephone companies in July 1971 adopted a policy not to place classified job ads solely in Male- or Female-headed columns and to try to persuade newspapers to provide job ad columns without sex segregation. AT&T letter, July 9, 1971, Bell Exh. 1, Attachment C, FCC Docket 19143. This policy was ratified in the consent order of January 18, 1973 whereby the EEOC, Labor Department and the American Telephone and Telegraph Co. agreed on new nondiscrimination affirmative action programs, including $15 million back-pay to minorities and women previously subjected to racial or sex discrimination. *EEOC* v. *Bell System*, CA 73-149, U.S. Dist. Ct. E.D. Pa.

accomplish this purpose, the Ordinance forbids those subject to its nondiscrimination requirements from publishing or circulating, or causing to be published or circulated, a discriminatory notice or advertisement relating to those matters. This prohibition was made in the belief that such discriminatory advertisements provide a major vehicle for accomplishing the forbidden acts of discrimination.

This prohibition against publication or circulation of discriminatory advertisements is not loosely or vaguely worded. On the contrary, it is precisely stated in section 8(e) as to unlawful employment practices; in section 9(d) as to unlawful housing practices; and section 10(a)(2) as to unlawful public accommodation practices. And sections 8(j), 9(g) and 10(b) of the Ordinance prohibit "any person" from aiding, inciting, compelling or participating in such respective unlawful practices.

Nor is the Ordinance aimed solely at publication in the media (i.e., newspapers, magazines, radio, or television). It precludes "any person" from publishing the discriminatory notice or advertisement, whether in a general newspaper or on his own. Indeed, it is not aimed at *any* function of a newspaper except when the publisher of the newspaper (a) acts discriminatorily in the role of an employer, employment agency or labor union, or landlord or seller of housing, or owner of a publicly available auditorium; or (b) publishes a discriminatory notice or advertisement relating to the forbidden employment, housing, or public accommodations practice.

Nothing in the Ordinance or the order of the court below touches even a scintilla of the Petitioner's freedom of speech or press. The Petitioner is in no way prohibited or hindered in publishing editorials, news articles, comments, cartoons, statements, or any other format for

expressing its views, or the views of its "Editor, Business Manager and Classified Ad Manager" (Petitioner's Brief, p. 11), or its writers or readers, on any subject. It is free to expound on what jobs should be held by men or by women, or whether sex discrimination in employment is good or bad, or whether laws barring such discrimination should be expanded or repealed, or the soundness of the court's order requiring it to eliminate sex-segregated column headings in its job ads, or any other topic.

Furthermore, the Ordinance places virtually no burden on a newspaper which, like the Petitioner, publishes classified job ads. Classifying the job ads by occupation is surely not burdensome. The Petitioner does so now. Even if a prospective advertiser insists on having a job ad printed with a sex designation, or under a sex-labeled heading, the newspaper is not obliged to exercise any burdensome judgment. It need only require the prospective advertiser to produce a certificate of exemption from the Human Relations Commission under section 7(d) of the Ordinance, and the newspaper may then print the job ad with the sex label.

The Ordinance is thus narrowly drawn to deal with the evil of promoting discrimination based on race, religion, sex, etc., *in the context of a commercial advertisement* which seeks to fill a particular job, or to sell or rent a particular house or apartment, or to restrict admission into a particular place of public accommodation. It does not cut down in any way the newspaper's right or ability to express its views for or against the merits of the anti-discrimination requirements of the law.

Even if the Ordinance somehow burdened the Petitioner, "It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal

statutes of general applicability." *Branzburg* v. *Hayes*, 408 U.S. 665, 682 (1972). This Court has repeatedly held that the First Amendment does not immunize the press from laws of general application, such as the National Labor Relations Act,[21] the Fair Labor Standards Act,[22] the Sherman Anti-Trust Act,[23] and nondiscriminatory tax laws not directed against the expression of views.[24] Lower Federal courts have ruled similarly in cases upholding laws prohibiting the publishing of advertisements which directly promoted a particular existing lottery (but not inhibiting free expression of ideas as in editorials, etc.),[25] and laws prohibiting "blockbusting" advertising, *i.e.*, making representations regarding entry of persons of a particular race, religion or national origin into a neighborhood in order to induce sales or rentals of dwelling units.[26]

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[21] *Associated Press* v. *NLRB*, 301 U.S. 103 (1937) ("The publisher of a newspaper has no special immunity from the application of general laws." P. 132).

[22] *Oklahoma Pres Publ. Co.* v. *Walling*, 327 U.S. 186 (1946); *Mabee* v. *White Plains Publ. Co.*, 327 U.S. 178 (1946) ("As the press has business aspects, it has no special immunity from laws applicable to business in general." P. 184).

[23] *Associated Press* v. *United States*, 326 U.S. 1 (1945); *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951) (upheld injunction forbidding publisher to discriminate as to *arrangement and location of advertisements* by an advertiser who also placed ads in other media. P. 157); *Indiana Farmer's Guide Publishing Co.* v. *Prairie Farmer Publishing Co.*, 293 U.S. 268 (1934).

[24] *Murdock* v. *Pennsylvania*, 319 U.S. 105, 112 (1943); *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250 (1936).

[25] *New York State Broadcasters Assn.* v. *United States*, 414 F.2d 990, 997 (C.A. 2, 1969), *cert. den.* 396 U.S. 1061 (1970).

[26] *United States* v. *Bob Lawrence Realty*, 313 F. Supp.870, 872 (D.C. N.D. Ga. 1970) ("It is evident that the statute does not make mere speech unlawful. What it does make unlawful is

In particular, the Petitioner's attempt to invoke the First Amendment as a shield against the Ordinance fails to recognize the solid demarcation between the expression of ideas protected by the First Amendment, and conduct in operating a publishing business in a wholly commercial context which that Amendment does not immunize from governmental regulation.

There is a world of difference, so far as the First Amendment is concerned, between "communicating information . . . and opinion" and "purely commercial advertising."[27] Thus, while the First Amendment protects from governmental regulation an editorial or a panel debate on the merits of cigarette smoking, it does not immunize against a statute prohibiting the advertising of cigarettes for sale.[28]

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economic exploitation of racial bias and panic selling. We conclude that the statute is one regulating conduct, and that any inhibiting effect it may have on speech is justified by the Government's interest in protecting its citizens from discriminatory housing practices and is not violative of the First Amendment."); *United States* v. *Mitchell*, 327 F. Supp. 476, 486 (D.C. N.C. Ga. 1971); *United States* v. *Mintzes*, 304 F. Supp. 1305, 1312 (D.C. D. Md. 1969).

[27] *Valentine* v. *Chrestenson*, 316 U.S. 52, 54 (1942); *Breard* v. *Alexandria*, 341 U.S. 622, 641-645 (1951) (soliciting magazine subscriptions); *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 139 (1969) ("Neither news gathering nor news dissemination is being regulated by the present decree. It deals only with restraints on certain business or commercial practices" of newspapers.)

[28] *Capital Broadcasting Co.* v. *Acting Attorney General*, 405 U.S. 1000 (1972), *affg.*, 333 F. Supp. 582 (D. D.C. 1971); *Banzhaf* v. *FCC*, 405 F.2d 1082, 1101-1102 (D.C. Circ. 1968), *cert. den.* 396 U.S. 842 (1969) ("Promoting the sale of a product is not ordinarily associated with any of the interests the First Amendment seeks to protect. As a rule, it does not affect the political process, does not contribute to the exchange of ideas, does not

[Footnote continued on next page]

The principal purpose of classified ads in newspapers is not to express the newspaper publisher's belief, or even the belief of its advertisers, about the social utility of sex discrimination in employment. Instead, the job ads are intended solely to solicit employees for the advertisers, and money for the newspapers.[29] Hence, they are wholly unlike the advertisements and books involved in the cases which the Petitioner's Brief (p. 16) cites as granting First Amendment protection to commercial publications. In *New York Times* v. *Sullivan*, 376 U.S. 254, 266 (1964), the full-page advertisement in the New York Times protesting police brutalities against Negroes in Alabama "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern." In *Smith* v. *California*, 361 U.S. 147 (1959), the imposition of absolute criminal liability on the sale of obscene books, regardless of *scienter*, would have inhibited distribution of, and public access to, constitutionally protected books and literature as well as obscene material. No such *in terrorem* effect results from the

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provide information on matters of public importance, and is not, except for the ad-men, a form of individual self-expression. It is rather a form of merchandising subject to limitation for public purposes like other business practices.")

[29] According to data from MEDIA RECORDS 16, 18, *Classified Advertising of the First Fifty Sunday and Morning Newspapers* (1970): "... Published lineage figures for the first eleven months of 1970, for example, were $16,673,673 for the morning Los Angeles Times and $10,973,049 for its Sunday paper. A rule of thumb sets help-wanted advertising at approximately one-third of a newspaper's total commercial lineage...." Boyer, "Help-Wanted Advertising—Everywoman's Barrier," 23 Hastings L.J. 221, 223, ftnt. 7 (Nov. 1971).

Pittsburgh Ordinance's prohibition against sex-segregating job ad columns.

We believe that the proper line between constitutionally protected free speech and commercial discriminatory advertising which the legislature may prohibit was correctly drawn in Senior Circuit Judge Sobeloff's unanimous opinion in *United States* v. *Hunter*, 459 F.2d 205 (CA 4, 1972), *cert. den.* 93 S. Ct. 235 (October 16, 1972), under reconsideration in No. 72-146. In that case, a newspaper published a classified advertisement to rent an apartment in a "white" home. Section 804(c) of the Civil Rights Act of 1968 (42 U.S.C. 3604(c)) prohibits publication of any advertisement concerning sale or rental of a dwelling which indicates "any preference, limitation, or discrimination based on race, color, religion, or national origin. . .", and thus, except as to sex, is virtually identical with section 9(d) of the Pittsburgh Ordinance. Judge Sobeloff's opinion flatly rejected the newspaper's contention that the First Amendment precluded applying section 804(c) to a newspaper. The *Hunter* case involved a Federal statute and race discrimination in a housing ad, while this case involves a local ordinance and sex discrimination in job ads. But there is no difference in principle. Judge Sobeloff's view that the First Amendment does not immunize a newspaper from a statute prohibiting publication of discriminatory classified ads is equally applicable to the First Amendment contention in this case.

We believe that the Petitioner's First Amendment argument in this case is so insubstantial as to verge on the frivolous.

## II. THE ORDER OF THE COURT BELOW DID NOT VIOLATE DUE PROCESS AND THE PETITIONER'S DUE PROCESS ARGUMENT MISAPPREHENDS THE BASIS FOR THAT ORDER.

The Petitioner's contention that its right to due process of law was violated by the court below is based on something that court did not do. According to Petitioner, the court below ruled that the Petitioner's sex-labeling of job ads "aided an employer in discrimination in hiring . . . without proof that an advertiser discriminated in hiring" (Pet. Brief on Petition for Certiorari, p. 14). At another page (p. 16), the Petitioner says that it was "found as aiding in the discrimination in hiring of women without knowledge that any advertiser has in fact used its classified advertisements as a device to deny women equal consideration for employment positions."

But that isn't what the Court below ruled.

The Petitioner's argument misapprehends the basis for the order of the court below. That court didn't say that Petitioner had "aided an employer in discrimination in hiring." It ruled only that the Petitioner had aided an employer in doing one particular act – publishing a job ad which indicates sex discrimination – which the statute "declared to be an unlawful employment practice."

Section 8 of the Ordinance has 10 subparagraphs – (a) through (j) – defining various kinds of unlawful employment practices. One of these occurs when an employer, employment agency, or labor organization causes to be published or circulated a notice or advertisement relating to employment or membership which "indicates" any discrimination because of race, religion, sex, etc. (Sub-

paragraph (e), which is modeled on section 704(b) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(b)). Subsection 4(b) of the Ordinance defines discrimination as constituting "any difference in treatment based on" race, sex, etc. Thus, the unlawful employment practice specified in subsection (e) is the act of causing to be published or circulated a notice or advertisement which "indicates" a "difference in treatment" based on race, sex, etc. It is that practice which the newspaper aided, and thereby violated subsection 8(j) of the Ordinance, which forbids "any person" to aid or compel "the doing of any act declared to be an unlawful employment practice."

It was unnecessary for the Commission to prove that an advertiser had engaged in *other kinds of unlawful employment practices* (such as refusing to hire or to promote, or otherwise discriminating against, any employee or prospective employee because of race, sex, etc.) in order to hold that the Petitioner violated subsection (j) by aiding in "the doing of" the unlawful employment practice defined in subsection (e). The Commission's finding that the Petitioner aided advertisers in committing the unlawful employment practice defined in subsection 8(e) was fully in accord with the plain structure and purpose of the Ordinance, and the Petitioner had full notice and opportunity to contest the charge. Hence, the order of the court below did not violate the Petitioner's rights to due process of law.

## CONCLUSION

The ruling of the court below – that the Petitioner violated section 8(j) of the Pittsburgh Ordinance by aiding the commission of an unlawful employment

practice prohibited by subsection (e), namely, publishing a job ad which indicated difference in treatment in employment based on sex, with respect to jobs not exempt under the Ordinance – was constitutional and correct, and should be affirmed.

Respectfully submitted,

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## APPENDIX

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*Alaska*, Stats. §18.80.220(a)(3); CCH-*Employment Practices Guide*, ¶20,218.

*Arizona* Rev. Stat., §41-1462(3); CCH-EPG, ¶20,405.

*California*, Labor Code, Part 4.5, §1420(d); CCH-EPG, ¶20,811.

*Colorado* Rev. Stats., §80-21-6(7)(c); CCH-EPG, §21,006.

*Connecticut* Gen. Stats., §31-126(f); CCH-EPG, ¶21,205.

*District of Columbia* Police Regs., Art. 47, §4(d)(ii); CCH-EPG, ¶21,604.

*Hawaii* Rev. Stat., Tit. 21, §378-2(3); CCH-EPG ¶22,002.

*Idaho* Code, §67-5909(4); CCH-EPG ¶22,209.

*Illinois* Rev. Stat. ch. 48, §851-867 (1971) and Commission Guidelines of Nov. 3, 1971, Art. IV(B), CCH-EPG, ¶22.497.04.

*Iowa* Code Ann., Tit. 40, §601A.7.1(c); CCH-EPG ¶22,807, and Commission Guidelines of Nov. 5, 1970, §1.1 and 1.2, CCH-EPG ¶22,875.

*Kansas* Stats. §44-1009(a)(3); CCH-EPG ¶23,008; and Commission Guidelines of Oct. 21, 1972, §21-32-8, CCH-EPG, ¶23,093.08.

*Kentucky* Stats. §344.080; CCH-EPG ¶23,208.

*Maryland* Code Ann., Art. 49B, §19(e); CCH-EPG ¶23,812.

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*Massachusetts* Gen. Laws, Ch. 151B, §4(3); CCH-EPG ¶24,005 and Commission Guidelines Art. B, CCH-EPG ¶24,051.11.

*Michigan* Comp. Laws, §423.303a(d); CCH-EPG ¶24,203a.

*Minnesota* Stats. §363.03 Subdiv. 1(4)(b); CCH-EPG ¶24,403 and Commission Guidelines eff. June 22, 1971 §6; CCH-EPG ¶24,490.06.

*Missouri* Rev. Stat. §296.020(3); CCH-EPG ¶24,802.

*Nebraska* Rev. Stat. §48-1115; CCH-EPG ¶25,115.

*Nevada* Rev. Stat., §613.340.2; CCH-EPG ¶25,204.

*New Hampshire* Rev. Stat. Ann., §354-A:8.3; CCH-EPG ¶25,408.

*New Jersey* Rev. Stat., §10:5-12.C; CCH-EPG ¶25,614.

*New Mexico* Stats. §4-33-7(d); CCH-EPG ¶25,807.

*New York* Consol. Laws, Executive Law, §296-1(d) and 1-a(d); CCH-EPG ¶26,007.

*Oklahoma* Stats. §25-1306; CCH-EPG ¶26,861.

*Oregon* Rev. Stat. §659.030-(3); CCH-EPG ¶27,007.

*Pennsylvania* Purdon's Penn. Stat. Ann., Tit. 43, §955(b)(2); CCH-EPG ¶27,204 and §2 of Commission Guidelines as amended Dec. 25, 1971 (1 Pa. Bull. 2359), CCH-EPG ¶27,296.02.

*Puerto Rico,* Act 100 of June 30, 1959, as amended by Act 50, Laws 1972, sec. 1-A.

*Rhode Island* Gen. L., §28-5-7(d)(4); CCH-EPG ¶27,507.

*South Dakota* Comp. L., §20-13-13(4); CCH-EPG ¶27,806.

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*Utah* Code Ann. §34-35-6(d); CCH-EPG ¶28,106.

*Vermont* Stats. Ann., Tit. 21, §495(2); CCH-EPG ¶28,201.

*Washington* Rev. Code, §49.60.180(4) and 49.60.200; CCH-EPG ¶28,518 and ¶28,520.

*West Virginia* Code, §5-11-9(b)(2) and (d)(4); CCH-EPG ¶28,709.

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## QUESTIONS PRESENTED

I. Does the order of the Human Relations Commission enforcing the ordinance of the City of Pittsburgh, prohibiting a newspaper from placing help-wanted advertisements for jobs not carrying bona fide occupational exemptions in sex-segregated columns, violate the First Amendment to the United States Constitution?

*(Answered in the negative by the Court below.)*

II. Did the proceedings before the City of Pittsburgh Human Relations Commission violate petitioner's right to due process of law?

*(Answered in the negative by the Court below.)*

## STATEMENT OF THE CASE

This case began on October 9, 1969, when the National Organization for Women, Inc. (NOW) filed a complaint (A. 4) with the City of Pittsburgh Commission on Human Relations (Commission), respondent herein.[1] The complaint charged the Pittsburgh Press, petitioner, with deliberate and constant violations of Section 8(j) of the Human Relations Ordinance of the City of Pittsburgh, Ordinance No. 75 of 1967 (A. 410-32), as amended by Ordinance No. 395 of 1969 (A. 433-36), by allowing employers to place advertisements in the male or female column when the jobs advertised do not have bona fide occupational qualification exemptions. Ordinance No. 75 is the basic anti-discrimination ordinance of the City; Ordinance No. 395 added discrimination on the basis of sex to the other discriminatory categories. Section 8(j) of the Ordinance makes it an unlawful employment practice for any person, defined in Section 4(j) so as to include a newspaper, to aid or participate in the doing of an act declared to be an unlawful employment practice (A. 422). Section 8(e) prohibits the placing of a discriminatory advertisement (A. 421).

[1] For the convenience of the Court, respondents have retained the method of referring to the appendices begun by petitioner. "Pet. App." refers to the appendix to the petition for certiorari. "A." refers to the separate appendix to the briefs.

*Statement of the Case*

Pursuant to Section 7(a) of the Ordinance (A. 417), the Commission made attempts to conciliate the matter, including the holding of a private hearing with the parties on October 17, 1969 (A. 14). When these attempts failed, the full Commission, with one member dissenting, found that the complaint set forth probable cause, and voted to hold a public hearing (A. 1, 14). On November 7, 1969, the complainant and petitioner were notified that the public hearing would be held and petitioner was furnished with a copy of the Complaint (A. 1, 14). On November 10, 1969, a notice of hearing on December 10, 1969 and a statement of charges were mailed to the parties (A. 1, 14). At the request of petitioner, the scheduled hearing was continued until January 15, 1970 (A. 1, 14).

After an answer and preliminary objections were filed by petitioner, hearings took place before the Commission on January 15 and 16 and February 12 and 26, 1970 (A. 1, 12). Various organizations were granted leave by the Commission to appear as amicus curiae. The Allegheny County Conference on Civil Rights, the National Association of Women Lawyers, the Pennsylvania Human Relations Commission and the Women's Equity Action League appeared as amici on behalf of complainant NOW, while the American Newspaper Publishers Association appeared as amicus for the Pittsburgh Press (A. 15).

At these hearings NOW presented testimony and exhibits showing that petitioner aided employers and other advertisers to discriminate against women.

Complainant's Exhibit No. 1 consists of advertisements in the Pittsburgh Press of January 4, 1970, showing the placement of advertisements, for which no bona fide occupational exemptions existed, in separate "Jobs—Male Interest" and "Jobs—Female Interest" columns (A. 37, 299-331).[2] Complainant's Exhibits No. 2 (A. 39, 333) and No. 3 (A. 120, 337-353) showed the same thing (No. 3 for a different date, December 28, 1969, with regard to jobs classified according to type of work).

Complainant presented testimony from the director of an employment agency that her experience had shown that placing an ad under "Male Interest" indicates a preference by the employer as to sex (A. 118). Petitioner's advertising manager himself testified that employers place ads in the "Jobs—Male Interest" column when they are looking for a man and the "Jobs—Female Interest" column when they are looking for a woman. If the advertiser does not express a preference, petitioner solicits one (A. 125-26, 173).

There was also testimony presented by complainant that several women had been discriminated against in hiring because of their sex when they applied for jobs advertised in the "Male" column (A. 264, 52-53, 122-23).

The three exhibits referred to above, along with complainant's Exhibit No. 4 (A. 97-100, 357-373),

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[2] Only a sampling of the advertisements set forth in Complainant's Exhibits Nos. 1 and 3 are set forth in the Appendix in this Court (A. 299-331, 337-353).

also showed the severe economic impact resulting from discrimination against women. Considerable sociological and psychological testimony was presented showing the harmful effects upon women of sex-segregated want-ads. This included the results of a study by Dr. Sandra Bem, Professor of Psychology at Carnegie-Mellon University, specializing in sex roles and sex differences, showing that an advertiser, by placing a want-ad in the "Male Interest" column, effectively discourages a large percentage of female applicants (A. 236-41).

Further, there was testimony that discrimination on the basis of sex is no different from discrimination for racial or any other non-merit factor, and that such discrimination causes the same harmful consequences to society (A. 72, 141).

Petitioner's case was basically that the want-ad system was set up to reflect reader preferences. Even if this were true, it would be irrelevant, as the Common Pleas Court pointed out (Pet. App. 41). However, the testimony of petitioner's advertising manager showed, as found below, that the system actually was set up to reflect advertiser preference (Pet. App. 16, 33, 41, 58; A. 125-26, 173, 389). Throughout its case, petitioner presented the position, contrary to the basic premise of the Ordinance, that sex discrimination was different from other forms of invidious discrimination (A. 180, 181, 287).

On July 23, 1970, the Commission issued an opinion and order (Pet. App. 1-18), to the effect that petitioner's want-ad system violated §8(j) of the

Human Relations Ordinance. Petitioner was ordered to cease and desist from violating the ordinance, and to utilize a want-ad system with no reference to sex.

Petitioner appealed to the Court of Common Pleas of Allegheny County, which wrote a second opinion in the case, and by order dated March 24, 1971, affirmed the order of the Commission, based upon the testimony given before the Commission (Pet. App. 19-45).

This order was in turn appealed to the Commonwealth Court of Pennsylvania, an intermediate appellate court. That tribunal, by opinion and order dated January 27, 1972 (Pet. App. 46-79; A. 377-408), modified the previous order so as to allow sex-designated column headings where the advertiser is exempt under the Ordinance or the job is certified by the Commission as qualifying for a bona fide occupational exemption (Pet. App. 69; A. 400). In other respects, the Commonwealth Court affirmed (Pet. App. 69; A. 400), with two judges dissenting as to a procedural due process question not raised by petitioner here (Pet. App. 70-79; A. 401-408).

All three tribunals below held that the placing of an advertisement for a job that did not have a bona fide occupational exemption was a violation of §8(e) of the Ordinance, that petitioner aided such violation, and that petitioner thus violated §8(j) (Pet. App. 16-17, 27-37, 51, 66; A. 382, 397). It was held that although the record showed violations by advertisers of §8(a) (Pet. App. 58; A. 389), prohibiting discrimination in hiring, such showing was

unnecessary to the decision, as the violations of §8(a) were clear. All three bodies held that the commercial advertising system involved here was not entitled to protection under the First Amendment (Pet. App. 7, 43-44, 65-66; A. 396-97), and that petitioner had not been deprived of due process of law (Pet. App. 3, 39-41, 52-57; A. 383-88).

The Press' petition to the Supreme Court of Pennsylvania for allowance of appeal was denied by order dated June 21, 1972, with one justice voting to allow the appeal to consider the First Amendment question (Pet. App. 80-81).

The Press then petitioned this Honorable Court for a writ of certiorari, which writ was granted on December 4, 1972, 93 S. Ct. 515.

## SUMMARY OF ARGUMENT

The order of the Pittsburgh Human Relations Commission, prohibiting the Pittsburgh Press from placing employment advertisements in columns headed "Male" or "Female" when the job advertised does not carry a bona fide occupational exemption is not violative of the First Amendment. The case law, from *Valentine v. Chrestensen*, 316 U.S. 52 (1942), to the present, has uniformly held that commercial advertising is not protected speech. The First Amendment protects the exposition of ideas, speech which is concerned with public affairs. It does not protect commercial speech concerned solely with private business transactions.

The federal courts have sustained numerous statutes which prohibit advertising. Some, like the Civil Rights Acts of 1964 and 1968, prohibit discriminatory advertising, as does the Pittsburgh Ordinance, and others prohibit advertising of products harmful to society, like cigarettes.

Commercial advertising can be regulated by a general regulatory statute, such as this one prohibiting discrimination, despite an incidental effect upon speech. Particularly is this so where the speech, like petitioner's, is intertwined with action. Speech can be regulated for a legitimate police power reason, and speech that aids in the perpetration of an unlawful act is the clearest case for regulation.

*Summary of Argument*

Neither the City Ordinance nor the Commission's order imposes any "official government view" on petitioner, which is free to editorialize as it pleases upon sex discrimination, but simply may not use its want-ad system to perpetuate such discrimination. Nor does the Commission's order constitute an invalid prior restraint, as harmful commercial advertising has always been subject to the injunctive process. Finally, no chilling effect upon protected speech results from petitioner's being required to reject discriminatory ads. Not only are commercial ads unprotected speech because not expositions of ideas but the decision as to whether an ad is discriminatory is clear-cut, and no difficult screening process is required.

The Commission's order is not violative of due process of law. Although the evidence did show discrimination in *hiring* by employers, that evidence was superfluous, as petitioner's system unlawfully aids employers in placing discriminatory advertisements, which itself is a violation of the ordinance. The state courts have determined that placing an ad in a sex-designated column is discriminatory, and this reasonable construction of the ordinance is conclusive here. Moreover, the evidence, including the testimony of petitioner's advertising manager, shows how such ads aid employers to discriminate in hiring.

The "presumption" cases cited by petitioner are inapplicable here because there is no presumed fact. The violation is not discrimination in hiring, pre-

sumed from the placement of a discriminatory ad. The placement itself violates the Ordinance.

Although petitioner does not concede that sex discrimination, like other forms of discrimination, is an evil, petitioner basically seems to be arguing that there is no reasonable relationship between the assumed evil of sex discrimination and the means chosen to eliminate the evil, including prohibition of sex-segregated want-ads. This is a substantive due process argument, unlike the procedural due process arguments made below and in the petition for certiorari, and thus it cannot be raised for the first time here. In any event, the argument does not avail petitioner, as this Court has, for the last thirty-five years, declined to sit as a super-legislature to invalidate social and economic legislation with which it may not agree. In light of the numerous authorities holding that discriminatory advertising contributes to discrimination in employment, as well as the evidence in this case, the means chosen by the City of Pittsburgh to combat sex discrimination cannot be considered irrational.

The question of notice of the charges and sufficiency of the complaint is not before this Court, since the Amicus American Newspaper Publishers Association cannot raise issues not raised by petitioner. However, even judged by criminal standards, unnecessary here, both the complaint and the evidence were sufficient, as the proof shows that the offense, which petitioner aided, of placing a discriminatory advertisement was committed by thousands of advertisers. By all standards of fairness, petitioner had ample notice of the charges against it.

## ARGUMENT

### I. THE PROHIBITION OF SEX-SEGREGATED NEWSPAPER ADVERTISEMENTS DOES NOT VIOLATE THE FIRST AMENDMENT

#### A. Commercial Advertising Is Not Protected Speech Under the First Amendment

The Commonwealth Court of Pennsylvania, in discussing this issue, stated that the American Newspaper Publishers Association, Amicus, had raised the "specter" of an alleged violation of the newspaper's right to freedom of the press (Pet. App. 65; A. 396). The Court's appellation is apt, for the issue is lacking in substance. The great constitutional guarantee is denigrated when it is sought to be applied in the instant situation.

The City of Pittsburgh Commission on Human Relations, an administrative body created for and devoted to the ideal of protecting civil rights, the Court of Common Pleas of Allegheny County, and the Commonwealth Court of Pennsylvania, all considered this issue, and found petitioner's First Amendment argument totally lacking in merit. They cited numerous cases, both federal and state, holding that commercial advertising may not avoid police power regulation by crying "First Amendment."

*Argument*

**1. The absolutist theory of the First Amendment has not prevailed.**

Petitioner asserts an absolutist view of the First Amendment which, although advanced by some, most notably the late Justice Black, has never been accepted by a majority of this Court. In *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961), this Court, speaking through the late Justice Harlan, held:

> "At the outset we reject the view that freedom of speech and association [citing a case] as protected by the First and Fourteenth Amendments, are 'absolutes.'"
>
> 366 U.S. at 49.

Likewise, Justice Brennan has stated that:

> "... the absolute view has not prevailed within the Court. A majority of the Justices from time to time have recognized some contexts in which government has power to curb speech as such."
>
> Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harv. L. Rev. 1, 5 (1965).

Justice Harlan in *Konigsberg* pointed out that in at least two ways, constitutionally protected freedom of speech is narrower than the absolute which petitioner would assert. The first is that:

> "... certain forms of speech, or speech in certain contexts, has been considered outside the scope of constitutional protection."
>
> 366 U.S. at 50.

The absolute approach

> ". . . cannot be reconciled with the law relating to libel, slander, misrepresentation, obscenity, perjury, *false advertising*, solicitation of crime, complicity by encouragement, conspiracy, and the like. . . ." (Emphasis added.)
>
> 366 U.S. at 49 n.10.

In *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), this Court, in denying First Amendment protection to "fighting words", held that the Amendment does not protect expression which is "no essential part of any exposition of ideas."

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**2. Commercial advertising in this Court: Valentine v. Chrestensen to New York Times Co. v. Sullivan.**

It is well settled, in particular, that while "freedom of communicating information and disseminating opinion" enjoys a high degree of protection, "the Constitution imposes no such restraint on government as respects purely commercial advertising." *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942). "In the quarter century since Valentine v. Chrestensen the notion that commercial advertising is not protected by the First Amendment has been enshrined among the commonplaces of constitutional law." *Developments in the Law—Deceptive Advertising*, 80 Harv. L. Rev. 1005, 1027 (1967).

In that case, this Court sustained the constitutionality of a New York City ordinance prohibiting the

distribution of commercial and business advertising matter. On the basis of the *commercial* advertising involved in *Valentine*, it was distinguished from *Schneider v. Town of Irvington*, 308 U.S. 147 (1939), in which several ordinances either totally forbidding or severely restricting the distribution of handbills were struck down as an infringement upon the First Amendment.

*Valentine v. Chrestensen* is good law today. It has been cited with approval by this Court in *Jamison v. Texas*, 318 U.S. 413, 417 (1943); *Murdock v. Pennsylvania*, 318 U.S. 105, 111 (1943); *Martin v. Struthers*, 319 U.S. 141, 142 (1943); *American Communications Assn. v. Douds*, 339 U.S. 382, 412 (1950); and more recently in *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964); *Ginzburg v. United States*, 383 U.S. 463, 474 (1966) and *Time, Inc. v. Hill*, 383 U.S. 374, 381 (1967). In *Ginzburg*, this Court, assuming that the disputed publications were not obscene in themselves, found them to be unprotected by the First Amendment viewed against "a background of *commercial* exploitation." (Emphasis added.) 383 U.S. at 466.

Justice Brennan, speaking for the Court in *New York Times*, was careful to distinguish the political advertisement involved there from the commercial type of advertising involved in *Valentine v. Chrestensen*, which we have here. Sullivan had argued that the guarantees of freedom of speech and of the press were inapplicable because the allegedly libelous statements were published as part of a paid advertise-

ment. This Court distinguished commercial advertisements from what has been called an "advertorial" involved there. Note, *Resolving the Free Speech-Free Press Dichotomy: Access to the Press Through Advertising*, 22 U. Fla. L. Rev. 293, 299 n.47 (1969).

The *Times* Court held:

> "The publication here was not a 'commercial' advertisement in the sense in which the word was used in Chrestensen. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern."
>
> 376 U.S. at 266.

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**3. Ideas vs. Non-Ideas: The want-ad system seen in light of New York Times and the Meiklejohn Theory.**

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(a) *Want-Ads and Their Headings Are Non-Ideas*

In contrast to the situation in *New York Times Co. v. Sullivan*, supra, we are here dealing with want-ads. As stated by the Court of Common Pleas "it is difficult to think of a more commercial aspect of the paper than captions to the classified advertising section" (Pet. App. 43).

Petitioner has argued that its format for the placement of want-ads constitutes an editorial function.

In essence it asks this Court to suspend all of its common sense and practical knowledge, as well as to ignore the record in this case. Petitioner asserts here that it places the ads in a manner which it believes will facilitate the convenience of its readers; yet the record clearly shows that the arrangement is for the convenience of the advertisers (Pet. App. 58; A. 389). The basic facts, as opposed to mixed questions of fact and law, as found by the State courts are not open to review here. *King v. West Virginia*, 216 U.S. 92 (1910).

Want-ads are placed by employers or employment agencies to obtain a person to fill a job in the economic world; they are "no essential part of any exposition of ideas." *Chaplinsky v. New Hampshire*, 315 U.S. at 572. The framework of the newspaper want-ad section, directing these non-ideas in certain directions like a traffic patrolman on a street corner, cannot raise the non-ideas to the level of ideas. It can however, as will be discussed in Part II of this Brief, aid in discrimination on the basis of sex when arranged as petitioner arranges its want-ads. The column headings are a part of a commercial aspect of the newspaper, directed toward raising revenue and not propagating ideas. Newspapers are big business. See Note, *The Duty of Newspapers To Accept Political Advertising—An Attack on Tradition*, 44 Ind. L.J. 222 (1969); Note, *Resolving the Free Speech-Free Press Dichotomy*, supra. The want-ad section is part of the business aspect of the newspaper, not part of its exposition of ideas.

Respondents are thus not in disagreement with the thrust of Justice Douglas' concurring opinion in *Cammarano v. United States*, 358 U.S. 498, 515 (1959), in which he asserts that owners of a beer distributorship who advertise seeking to defeat legislation which would make liquor a state monopoly, are exercising First Amendment rights despite their profit motive in so doing. Respondents do not claim that a mere commercial form removes the protection of the First Amendment. Such a view would obviously be inconsistent not only with *New York Times Co. v. Sullivan*, supra, but with *Smith v. California*, 361 U.S. 147, 150 (1959), decided shortly after *Cammarano*, where First Amendment protection attached to a bookseller, even though the dissemination took place under commercial auspices. Respondents are not contending that petitioner be prohibited from expressing any view it desires on any subject, including the propriety of sex discrimination, in its editorial or news columns, or even the comics, merely because newspapers are sold. *New York Times*, 376 U.S. at 266. We are insistent, however, that captions in want-ads do not express ideas, and, in line with *Valentine v. Chrestensen*, supra, are not protected by the First Amendment.

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(b) *The Meiklejohn Theory*

The principle that commercial speech, viewed with the gloss of *Smith* and *New York Times*, is not entitled to First Amendment protection, is sound. Professor Emerson has stated:

> "... communications in connection with commerical transactions generally relate to a separate sector of social activity involving the system of property rights rather than free expression, ..."
>
> Emerson, *Toward a General Theory of the First Amendment*, 105 n. 46 (1966).

In Note, *Freedom of Expression in a Commercial Context*, 78 Harv. L. Rev. 1191, 1195 (1965), it is stated:

> "The possibly desirable objectives furthered by advertising would not seem to require its protection by the First Amendment, particularly since the primary purpose of commercial advertising is to advance the economic welfare of business enterprises, over which state and federal governments enjoy wide powers of regulation."

See also *The First Amendment and Regulation of Television News*, 72 Columbia L. Rev. 746, 757 (1972).

Moreover, the principle is in complete accord with Dr. Meiklejohn's theory of the First Amendment, a theory which has apparently been accepted by this Court. Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, supra. The Meiklejohn theory is expounded in Meiklejohn, *The First Amendment Is an Absolute*, 1961 Supreme Court Review 245, a note whose content cannot be garnered from its title. For the theory is far from that of Justice Black. Rather it is a view that,

with regard to *public affairs*, freedom of expression is absolute:

> "The First Amendment does not protect a 'freedom to speak'. It protects the freedom of those activities of thought and communication by which we 'govern'. *It is concerned not with a private right*, but with a public power, a governmental responsibility.
>
> * * *
>
> Public discussions of public issues, together with the spreading of information and opinions bearing on these issues, must have a freedom unabridged by our agents." (Emphasis added.)

Meiklejohn, *The First Amendment Is an Absolute*, supra, at 255, 257.

The Meiklejohn theory finds support in the thoughts of the framers of the Constitution. In *Roth v. United States*, 354 U.S. 476, 484 (1957), this Court quoted a letter of the Continental Congress to the inhabitants of Quebec in 1774. The letter indicated that their view of freedom of the press was to assure unfettered interchange of ideas for the bringing about of political and social change.

Outside this realm of public affairs, which includes not just issues upon which we vote, but expressions in the realms of education, philosophy, the sciences, literature, and the arts, by which expressions we learn to become more responsible citizens in the public world, the First Amendment is inapplicable:

> "We must recognize that there are many forms of communication which, since they are not being used as activities of governing, are wholly outside the scope of the First Amendment."
>
> Meiklejohn, *The First Amendment Is an Absolute*, supra, at 258.

Dr. Meiklejohn points out that Justice Holmes had recognized these, as had Justice Harlan, and refers to *Konigsberg v. State Bar of California*, supra.

*New York Times Co. v. Sullivan*, supra, and its progeny seem to adopt in toto the Meiklejohn theory. The distinction in those cases between private libel and libel of a public figure is exactly the distinction which Dr. Meiklejohn drew. Respondents are shocked that petitioner would seek to rely on *New York Times*, for it is clear that the want-ad system, an economic mechanism whereby petitioner, for remuneration, performs the service of advertising jobs, lies on the private side of the public-private dichotomy. See *Grove v. Dun & Bradstreet, Inc.*, 438 F. 2d 433 (3d Cir.), cert. denied, 404 U.S. 898 (1971).

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**4. Statutes regulating advertising, including discriminatory advertising, have uniformly been held not to violate the First Amendment.**

The unprotected nature of commercial advertising speech has been recognized by the lower courts, some construing statutes and ordinances very similar to that involved here. In *Greenfield v. Field Enter-*

*prises, Inc.*, 4 E.P.D. ¶7763 (N.D. Ill. 1972), the Court construed §704(b) of the Civil Rights Act of 1964, 42 U.S.C.A. 2000e-3(b), which is quite similar to §8(e) of the Pittsburgh Ordinance.[8] Although holding that the language of that Act (which does not have a section prohibiting aiding or participating in discriminatory practices) excluded newspapers from its coverage, the Court pointed out that the section is not violative of the First Amendment in prohibiting help-wanted listings under separate male and female headings:

> "A first amendment issue has been raised in this case in the brief of the Chicago Tribune Company. This defendant sees the relief sought in this case as a prior restraint on freedom of the press, and clear violation of well-established first amendment protections, and condemns it as a most invidious encroachment upon cherished American rights.

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[8] Section 704(b) provides:

"(b) It shall be an unlawful employment practice for an employer, labor organization, or employment agency to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment."

> This alarm is without basis. In addition to being the conduits for the transmission of facts and opinions to the American public, newspapers are businesses. In their commercial aspect, they enjoy no special first amendment privileges. If their practices in the commercial business of publishing classified advertisements for compensation violate the Civil Rights Act of 1964, the first amendment does not shield them from the consequences of their activity."

Section 804(c) of the Civil Rights Act of 1968, 42 U.S.C.A. §3604(c), is another federal statute, like the Pittsburgh Ordinance, prohibiting discriminatory advertising.[4] In *United States v. Hunter*, 459 F. 2d 205 (4th Cir., Sobeloff, S.J.), cert. denied, 93 S. Ct. 235 (1972), the Government sought an injunction against a newspaper which had published certain discriminatory housing advertisements. Although refusing an injunction, the District Court entered a declaratory judgment sustaining the constitutionality of the above-quoted section against the assertion that it was violative of the newspaper's First Amend-

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[4] §3604. Discrimination in the sale or rental of housing.

* * *

* * *

* * *

(c) [It shall be unlawful] to make, print, or publish, or cause to be made, printed, or published, any notice, statement, or advertisement with respect to the sale or rental of a dwelling that indicates any preference, limitation or discrimination based on race, color, religion, or national origin or an intention to make any such preference, limitation, or discrimination."

ment rights. The publisher appealed to the Court of Appeals for the Fourth Circuit, which affirmed in a lengthy and erudite opinion. In the portion of the Court's opinion of particular relevance to this proceeding, the First Amendment argument was rejected on the basis of the line of cases following *Valentine v. Chrestensen*, supra, the "unbroken line of authority from the Supreme Court down which distinguishes between the expression of ideas protected by the First Amendment and commercial advertising in a business context." 459 F. 2d at 211.

The Fourth Circuit opinion in *Hunter* notes that the constitutionality of §3604(c) as applied to newspapers has been upheld by the District Court in *Holmgren v. Little Village Community Reporter*, 342 F. Supp. 512 (N.D. Ill., 1971). The constitutionality of §3604(c) was also sustained in *United States v. A. B. Smythe Company, Inc.* (No. C 69-885, N.D. Ohio, 1970).[5] See also *United States v. Mintzes*, 304 F. Supp. 1305, 1312 (D. Md. 1969), and *An Anti-Blockbusting Ordinance*, 7 Harv. J. Legis. 402, 411, 413 (1970).

Several other federal statutes which prohibit advertising of one type or another have been held not to run afoul of the First Amendment. In *Capital Broadcasting Co. v. Acting Attorney General*, 405 U.S. 1000 (1972), aff'g. 333 F. Supp. 582 (D.D.C. 1971) (three-judge court), the Act of April 1, 1970,

[5] A copy of this opinion can be found as an Appendix to the brief of the United States in the Court of Appeals in *Hunter*, supra, cert. denied, 93 S. Ct. 235 (1972).

Pub. L. 91-222, §2, 84 Stat. 89, 15 U.S.C.A. §1335, prohibiting cigarette advertising on any medium of electronic communication subject to the jurisdiction of the FCC, was held to be constitutional as against First Amendment attacks. The three-judge court pointed out that advertising is not protected the same way other forms of speech are, and stated that Congress has the power to prohibit the advertising of cigarettes in any media. See also *Banzhaf v. F. C. C.*, 405 F. 2d 1082, 1101 (D.C. Cir. 1968), cert. denied sub nom. *Tobacco Institute, Inc. v. Federal Communications Commission*, 396 U.S. 842 (1969), where the Court of Appeals noted:

> "Promoting the sale of a product is not ordinarily associated with any of the interests the First Amendment seeks to protect."

The same situation applies, of course, to employment want-ads which promote the sale of a "product" also, i.e., job openings. Just as Congress has the power to prohibit cigarette ads, so too does the Council of the City of Pittsburgh have the power to prohibit advertising that aids in discrimination.

In *New York State Broadcasters Assoc. v. United States*, 414 F. 2d 990 (2d Cir. 1969), cert. denied, 396 U.S. 1061 (1970), the Court held that the Act of June 24, 1948, c. 645, 62 Stat. 763, 18 U.S.C.A. §1304, prohibiting the broadcasting of lottery information, did not violate the First Amendment. Similarly, the Court in *Securities & Exchange Comm. v. Texas Gulf Sulphur Co.*, 446 F. 2d 1301, 1306 (2d Cir.), cert. denied, 404 U.S. 1005 (1971), re-

jected the contention that predicating a violation of SEC Rule 10b-5 on a press release is violative of the First Amendment. The Court held that "the First Amendment deals with the free exchange of ideas and not with commercial 'factual' speech", citing *Valentine v. Chrestensen*, among other cases. Thus the press release could be regulated, like registration statements and prospectuses, and like the want-ad system involved here.

The commercial advertising involved here is the type of "speech" that is unprotected by the First Amendment.

**B. General Regulatory Statutes Incidentally Affecting Speech, Particularly Speech Intertwined With Conduct, Are Not Violative of the First Amendment**

**1. General regulatory statutes incidentally affecting the press are common.**

We have noted earlier that Justice Harlan in *Konigsberg v. State Bar of California,* supra, in reviewing the First Amendment decisions of this Court, found at least two ways in which the First Amendment has been construed as less than absolute. The first, as we have seen, involved contexts in which speech, such as the commercial advertising here, is beyond the scope of constitutional protection. The second involves general regulatory statutes which incidentally affect speech:

> "[G]eneral regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the states to pass, when they have been found justified by subordinating valid governmental interests . . ."
>
> 366 U.S. at 50-51.

Even if we assumed, contrary to fact, that petitioner's commercial activity constitutes "protected speech, this by no means suggests that it cannot be regulated for a valid governmental purpose. Just

last term, this Court addressed itself to this issue in *Branzburg v. Hayes*, 408 U.S. 665 (1972). There a state statute of general applicability which incidentally affected the press was upheld and ample precedent was cited for such action. We quote therefrom:

> "It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. Under prior cases, otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed. The Court has emphasized that '[t]he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and properties of others.' Associated Press v. NLRB, 301 U.S. 103, 132-133 (1937)."
>
> 408 U.S. at 682-83.

The *Branzburg* Court pointed out that in *Associated Press v. NLRB*, 301 U.S. 103 (1937), this Court held that a news gathering and disseminating organization was not exempt from the requirements of the National Labor Relations Act. Later cases held newspapers subject to the Fair Labor Standards Act and the Sherman Anti-Trust Act. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 192-93 (1946); *Mabee v. White Plains Publishing Co.*, 327 U.S. 178 (1946); *Associated Press v. United States*,

326 U.S. 1 (1945); *Lorain Journal Co. v. United States*, 342 U.S. 143, 155-56 (1951).

As stated in *Branzburg:*

> "The prevailing view is that the press is not free with impunity to publish everything and anything it desires to publish. Although it may deter or regulate what is said or published, the press may not circulate knowing or reckless falsehoods damaging to private reputation without subjecting itself to liability for damages, including punitive damages, or even criminal prosecution. See New York Times Co. v. Sullivan, 376 U.S. 254, 279-280 (1964); Garrison Publishing Co. v. Butts, 388 U.S. 130, 147 (1967) (opinion of Harlan, J.); Monitor Patriot Co. v. Roy, 401 U.S. 265, 277 (1971). A newspaper or a journalist may also be punished for contempt of court, in appropriate circumstances. Craig v. Harney, 331 U.S. 367, 377-378 (1947)."
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> 408 U.S. at 683-84.

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**2. Petitioner's want-ad system is action mixed with speech, and is thus less protected than pure speech.**

In *Frohwerk v. United States*, 249 U.S. 204, 206 (1919), this Court, speaking through Justice Holmes, sustained the conviction of a newspaper publisher for conspiracy to violate the Espionage Act of 1917 by publishing articles aimed at the obstruction of re-

cruiting. In response to the defendant's argument that, as applied to the newspaper articles, the Act was unconstitutional, Justice Holmes replied:

> "[T]he First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not intended to give immunity for every possible use of language. Robertson v. Baldwin, 165 U.S. 275, 281. We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech."

Although aiding in discrimination may not be as heinous an offense as counselling to murder, it is just as much contrary to the express wishes of the relevant legislative body. This is true, even if, like counselling to murder, there is an idea associated with the conduct involved. This Court stated in *United States v. O'Brien*, 391 U.S. 367, 376 (1968):

> "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."

Judge Kaufman of the United States Court of Appeals for the Second Circuit has noted that "Conduct otherwise illegal cannot be condoned merely because the person engaging in it intends thereby to express an idea," giving the example of a bomb threat. Kaufman, *The Medium, the Message, and the First Amend-*

*ment*, 45 N.Y.U. L. Rev. 761, 773-74 (1970). See *New York State Broadcasters Ass'n v. United States*, supra at 997.

In *Donaldson v. Read Magazine*, 333 U.S. 178 (1948), this Court, speaking through Justice Black, sustained the power of the Postmaster General to prohibit various mailing rights of a magazine found by him to be conducting an enterprise to obtain money by false pretenses. The argument that such power violated First Amendment rights was rejected utterly. Freedom of press was held not to include the freedom to perpetrate swindling schemes. 333 U.S. at 191.

Just this term, this Court held that a police power regulation of the California Department of Alcoholic Beverage Control prohibiting various explicit sexual forms of entertainment in bars licensed by it, did not violate the First Amendment. *California v. LaRue*, U.S. , 93 S. Ct. 390 (1972). Justice Rehnquist pointed out that:

> "States may sometimes proscribe expression which is directed to the accomplishment of an end which the State has declared to be illegal when such expression consists in part of 'conduct' or 'action', Hughes v. Superior Court, 339 U.S. 460 (1950); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949)." 93 S. Ct. at 396.

Although *LaRue* was based in part on the state's power over liquor under the Twenty-first Amend-

ment, this Court recognized that the states require no specific grant of authority to legislate with respect to matters traditionally within the scope of the police power. 93 S. Ct. at 395. In any event, the anti-discrimination thrust of the Fourteenth Amendment provides at least as much support for the Pittsburgh Human Relations Ordinance as the Twenty-first did for the liquor regulation.

As in *LaRue*, in the instant case we are not in the realm of ideas; we are dealing with action as well as speech. This is not an editorial dealing with sex discrimination, but an actual participation in it. Moreover, the Press has not simply aided advertisers to discriminate by constituting itself as a passive medium for the transmission of the advertisements to the public as in *Hunter*, supra. It has actively participated in the aiding of discrimination by itself creating the discriminatory structure. In addition, the Commission's 6th Finding of Fact is that where advertisers express no preference for a column, petitioner, rather than placing the ad in the non-discriminatory Male-Female column, solicits a preference (Pet. App. 16).

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**3. Advertising is subject to regulation for legitimate purposes.**

The courts have recognized that advertising, in particular, can be controlled for a legitimate reason. *Capital Broadcasting Co. v. Kleindienst*, supra; *Banzhaf v. United States*, supra. Even where advertise-

ments are politically motivated, not the situation here by any stretch of the imagination, the courts have sustained their prohibition where reasonable requirements imposed under the police power have not been followed. See *United States v. Scott*, 195 F. Supp. 440 (D.N.D. 1961), upholding against attack on First Amendment grounds 18 U.S.C.A. §612, prohibiting the publication or distribution of political campaign statements which do not contain the names of those responsible for such statements.

Recognizing the legitimate police power concerns of the state, courts have generally denied the relevance of the First Amendment to regulation of advertising. *Developments in the Law—Deceptive Advertising*, supra, at 1036. See *Media and the First Amendment in a Free Society*, 60 Geo. L.J. 867, 968 (1972), and Lydick, *State Control of Liquor Advertising Under the United States Constitution*, 12 Baylor L. Rev. 43, 45 (1960). See also several cases in this Court sustaining regulation of advertising, where the First Amendment issue was not raised. E.g., *Erlenbaugh v. United States*, U.S. , 93 S. Ct. 477 (1972) (sustaining conviction for causing a "scratch sheet" newspaper to be transported in interstate commerce); *Head v. New Mexico Board*, 374 U.S. 424 (1963) (upholding as a valid health measure a prohibition of price advertising by optometrists); and *Packer Corporation v. Utah*, 285 U.S. 105 (1932) (upholding state prohibition of tobacco advertising on billboards or placards).

**4. Advertising an illegal act, such as discrimination, is subject to regulation.**

The prohibition of advertising that aids in discrimination is a much stronger case for state regulation than many of the cases cited above. Unlike, for instance, the California regulation in *California v. LaRue*, supra, or the prohibition of cigarette advertising in *Capital Broadcasting Co. v. Kleindienst*, supra, the Pittsburgh Ordinance is not directed merely at "speech", but is an "incidental burdening of the press" resulting from an enactment "of general applicability" prohibiting discrimination. *Branzburg v. Hayes*, supra, at 682.

Moreover, discrimination in employment is illegal under the City Ordinance, as well as under Pennsylvania Law, see Act of October 27, 1955, P. L. 744, 43 P.S. §§951 et seq., and Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §2000e et seq. By contrast, the sale of cigarettes or liquor is not itself illegal. Surely, the governmental interest is greater in prohibiting the advertising of an illegal act than it is in prohibiting the advertising of something which the government has not deemed harmful enough to the public interest to outlaw.

> "The easiest case is prohibition of advertising for a product whose sale is unlawful. Once the legislature has determined that sale of the product is sufficiently inimical to the public good to warrant criminal sanctions, it would seem that solicitation of the public to purchase the contraband need not be tolerated."

*Developments in the Law—Deceptive Advertising*, supra, at 1037.

The Pittsburgh Human Relations Ordinance as applied to discriminatory advertising is like the counselling to murder in *Frohwerk v. United States*, supra. The product being sold—discriminatory employment—is illegal, and so too is the advertising of that product.

The City of Pittsburgh Human Relations Ordinance is by no means rare in its prohibition of discriminatory advertising. Not only is it prohibited on the Federal level, but as early as 1956 a dozen states including Pennsylvania prohibited discriminatory advertising. Note, *The Regulation of Advertising*, 56 Colum. L. Rev. 1108 (1956). Today at least 36 states have such a prohibition. Lab. Rel. Rep. (FEP) 451.

The New York Civil Rights Law, Section 40, has specifically been held to apply to discriminatory advertising by newspapers. *Camp-of-the-Pines v. New York Times Co.*, 184 Misc. 389, 53 N.Y.S. 2d 475 (Sup. Ct. 1945). When the Times printed the plaintiff's ads without the language "selected clientele", the camp sued for breach of contract. The Court found that this phrase was a euphemism for "no Blacks or Jews", just as the Commission here found that the headings "Jobs-Male Interest" and "Jobs-Female Interest", constitute a discriminatory device. As one of its bases for granting the Times' motion for summary judgment, the Court held that the newspaper would be breaking the law if it printed a discriminatory ad.

## C. Petitioner's in Terrorem Arguments

### 1. Official government view.

In several places in its Brief, Petitioner claims that the Commission and the courts below have required it to hew to the "official government opinion" with regard to sex discrimination. Nothing could be further from the truth, as made clear below.

The Court of Common Pleas stated (Pet. App. 43):

> "The Order of the Commission in no way interferes with the editorial or news content of the newspaper. The Press may continue to express its editorial views with freedom. It may editorialize on this elimination of sex-segregated column headings or any other position related to the status of women supported by the publisher and editor. It may report the news on the subject as it sees fit."

Similarly, the Commonwealth Court supported this view (Pet. App. 66; A. 397).

*New York State Broadcasters Assn. v. United States*, supra, dealt at length with the shibboleth which petiitoner has raised here of "official government view." The Court aptly answered that argument:

> ". . . [I]nvoking the specter of an official government view does not dispose of the real issues before us. There is an 'official' govern-

ment view as to the sale of narcotics, see 21 U.S.C. §§173, 174, the offering of fraudulent securities, see 15 U.S.C. §78j(b), the interstate transportation of wagering paraphernalia, see 18 U.S.C. §1953, and the coercion of employees by employers, see 29 U.S.C. §158(a)(1), to name only a few. And the view extends to communications which are designed to—and do—directly effectuate these unwanted results. Clearly an advertisement listing the names and addresses of sellers of narcotics or of fraudulent stock could constitutionally be banned. Of course, we do not suggest that lotteries are a swindle or that lotteries and uncontrolled sale of narcotics are equally deserving of condemnation, but Congress has the power to have a 'view' as to these types of conduct and to take steps to inhibit each. Nor do we see a viable distinction here because there is legislative unanimity as to swindling or narcotics but a difference of opinion as to lotteries.

The real point here is that we are not primarily in the realm of ideas at all but are chiefly concerned with speech closely allied with the putting into effect of prohibited conduct."

414 F. 2d at 996-97.

Likewise, we are dealing here with speech that aids the putting into effect of prohibited conduct.

**2. Prior restraint.**

Petitioner also raises the cry of "prior restraint" based upon the landmark case of *Near v. Minnesota*, 283 U.S. 697 (1931). Like the "official government view" argument, it is a vital doctrine, but reliance upon it is misplaced here, as it was in *Hunter*, supra, and in the cases cited therein:

> "Congressional regulation of commercial advertising is not barred by Near v. Minnesota, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931), which condemned unlawful prior restraints on free speech. The Supreme Court and lower courts have frequently rejected First Amendment attacks on injunctions when the enjoined conduct or expression was not fully protected by the First Amendment. Lorain Journal Co. v. United States, supra (Unanimous opinion upholding injunction prohibiting publisher from accepting or rejecting commercial advertisements of others in violation of the antitrust laws); Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 439, 31 S. Ct. 492, 55 L. Ed. 797 (1911) (upholding injunction against union newspaper promoting boycott). See also Head v. New Mexico Board of Examiners, 374 U.S. 424, 432 n. 12, 83 S. Ct. 1759, 10 L. Ed. 2d 983 (1963). (injunction restraining newspaper from publishing optometrist's advertising affirmed against attack based on the due process clause.)"
>
> 459 F. 2d at 212, 213.

**3. Burden on press as a screening agency.**

Petitioner argues and Amicus American Newspaper Publishers Association complains at length that newspapers are being drafted as the "first line enforcement agencies" in the battle against sex discrimination by being forced to "screen" advertisements. This argument comes with ill grace from petitioner which takes pains to screen ads to make certain they go into the particular sex-designated column that employers want (A. 129, 157, 171).

The alleged burden is asserted to be unlawful on the authority of *Smith v. California*, 361 U.S. 147 (1959). Although petitioner does not elaborate on this position, in *Smith v. California* a conviction of a bookseller for sale of obscene literature was reversed because of the impossible burden that would be placed upon a bookseller if he were held accountable for the content of thousands of books. Similarly, in *Farmer's Educational & Cooperative Union v. WDAY, Inc.*, 360 U.S. 525, 530 (1959), this Court held that §315 of the Federal Communications Act providing for equal time for political candidates, forbids a station to delete libelous material and immunizes it from libel actions. The reasoning was that, because of time limitations, a station could not properly determine if material were libelous, and, if responsible for it, would err on the side of safety and speech would be chilled.

In the first place, this "screening" argument is inapplicable because all of the "speech" that would be chilled here is commercial speech, none of which has

the First Amendment protection accorded the books in *Smith v. California.*

Moreover, the instant case is not analogous to *Smith* and *WDAY* (or to the false advertising cases to which Amicus American Newspaper Publishers Association refers) because petitioner is not put in any sort of difficult position, where it is forced to guess whether a particular advertisement placed in a Male column or a Female column violates the ordinance. As stated in *Hunter:*

> ". . . a newspaper publisher can easily distinguish between permissible and impermissible advertisements in discharging his duty . . ."
> 459 F. 2d at 213.

In fact, the newspaper's "screening" argument is much weaker here than it was in *Hunter.* Clearly Amicus, represented by the same counsel that represents the newspaper in *Hunter,* is so taken with the screening argument in *Hunter* that it seems to be arguing that case rather than this one. It is at least arguable, as Amicus maintains, that words such as "selected clientele", which appeared in the advertisement involved in *Camp-of-the-Pines v. New York Times Co.,* supra, are not such certain earmarks of discrimination that a newspaper should be required to reject such ads or suffer the consequences.

However, petitioner faces no such dilemma. It need not guess as to whether the advertised job is entitled to a bona fide occupational exemption. It merely must refuse to place any advertisement in a

sex-segregated column unless the advertiser has a bona fide occupational exemption certificate as provided for in §7(d) of the Ordinance.

The California Attorney General has held that the mere maintenance of sex-segregated want-ad columns does not violate the California Fair Employment Practices Act, Cal. Labor Code Ann. §§1420(d), (f), since jobs for which a BFOQ exists can legally be advertised in sex-segregated columns. However, where the newspaper has knowledge that a BFOQ exists, the California Attorney General, citing the holding in this case, ruled that publication of a sex-segregated ad aids in discrimination. Opinion No. 71-46 (January 21, 1972).

Here the newspaper does have knowledge; as stated above, there is no guessing required as to whether a BFOQ exemption for a particular job exists. If the advertiser has failed to obtain an exemption certificate pursuant to §7(d), the job is not exempt. If the advertiser does not have such a certificate (no request for an exemption certificate has ever been made to the Commission on sex grounds (Pet. App. 15)), then the newspaper knows that the sex-segregated ad constitutes discrimination. *Cf. National Organization for Women v. Gannett Co. Incorporated*, No. 713/1972 (S. Ct. of N.Y., App. Div., 4th Dept., decided November 30, 1972), wheer the Court refused to find that the newspaper's sex-segregated system by itself constituted aiding and abetting an employer in a discriminatory practice because the New York statute did not have a procedure like §7(d) to tell the paper whether an employer was violating the law.

Since the newspaper has actual knowledge that an ad for a job without an exemption certificate is discriminatory, we need not even rely on Chief Justice Burger's holding in *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971), dealing with the Federal Civil Rights Act of 1964, that lack of discriminatory intent is irrelevant.

In summary, it is clear that this Court and many other courts have repeatedly refused to apply the First Amendment to a commercial advertising situation where no burden is placed upon the media and a substantial public interest is protected.

## II. THE ORDER THAT PETITIONER DESIST FROM AIDING EMPLOYERS TO DISCRIMINATE WAS NOT VIOLATIVE OF DUE PROCESS OF LAW

### A. Since the Mere Placing of an Advertisement in a Sex-Designated Column Itself Violates §8(e) of the Ordinance, Petitioner Has Aided and Participated With Advertisers in Unlawful Employment Practices

Petitioner contends that it has been denied due process of law because there was no proof that an advertiser discriminated in violation of the ordinance. Although the argument heading merely refers to an alleged lack of proof that an advertiser "discriminated in violation of the ordinance," whereas the argument heading in the Petition for Certiorari read "discriminated *in hiring* in violation of the ordinance," (emphasis added) respondents must assume that petitioner is still referring to discrimination in hiring.*

For it is perfectly apparent that advertisers have committed unlawful discriminatory employment practices in violation of the City of Pittsburgh Ordinance. This case thus cannot be analogized to the "no evidence" cases, *Shuttlesworth v. Birmingham*, 382 U.S.

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*Strangely enough, as the Commonwealth Court pointed out (Pet. App. 58; A. 389), petitioner objected on the grounds of relevancy when complainant introduced evidence of discrimination in hiring (A. 265-66).

87, 94-95 (1965), and *Thompson v. Louisville*, 362 U.S. 199, 206 (1960). Petitioner is simply incorrect in its assertion at page 24 of its brief that the Commonwealth Court held, *inter alia*, that (1) the prohibited aiding is committed by the mere use of sex-segregated column headings, and (2) no instance of a particular act of discriminatory practice by an advertiser need be shown.[7]

While the first contention might properly have been leveled at the Commission's order which required the total dismantling of the sex-segregated system, the Commonwealth Court's Order (Pet. App. 69; A. 400) modified the Commission's Order so as to permit sex-segregated advertising headings where the jobs advertised are exempt under the ordinance (Pet. App. 66-67; A. 397-98) or as may be certified as exempt by the Commission, i.e., BFOQ's (Pet. App. 67; A. 398).[7]

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[7] It should be noted that although the Commonwealth Court held that the City of Pittsburgh Commission on Human Relations has no jurisdiction over advertisements placed by advertisers located outside of the City, the Pennsylvania Commission on Human Relations, operating under similar legislation (43 P.S. §§951 et seq.) would govern as to those advertisers and those who aid them, like petitioner. In return for respondents' consent to the grant by the Pennsylvania Supreme Court of a supersedeas pending the proceedings in this Court, petitioner agreed that if the decision here is adverse to it, it will eliminate sex-segregated ads for those advertisers outside the City of Pittsburgh who would be governed by the Pennsylvania Act, thus obviating the need for duplicating proceedings by the Pennsylvania Commission.

The second contention is also incorrect. Petitioner ignores §8(e) of the Ordinance, whereby the placing of an advertisement indicating discrimination is itself an unlawful employment practice.

Discrimination is defined in §4(B) of the Ordinance, as amended by Ordinance No. 395, approved July 7, 1969, as follows:

> "(B) Discriminate or discrimination—
>
> The terms "discriminate" and "discrimination" include any difference in treatment based on . . . sex." (Pet. App. 107; A. 435)

That the Commission and the courts properly interpreted the Ordinance to hold that placing an ad in a sex-segregated column is indicating a difference in treatment based on sex, is indisputable here. First, this Court has held that it must accept the state court's interpretation of state legislation, including the Pittsburgh Ordinance involved here. *Garner v. Louisiana*, 368 U.S. 157, 169 (1961); *Kovacs v. Cooper*, 336 U.S. 77, 84-85 (1949). Second, the Commission and the state courts were clearly correct. Counsel for petitioner admitted this (A. 176):

> ". . . there obviously is a difference in treatment . . ."

In *Brown v. Board of Education*, 347 U.S. 483, 495 (1954), this Court held that separate educational facilities were inherently unequal.

The disclaimer is of no help to petitioner. As stated by the Commonwealth Court:

"We have long passed that point in the advancement of civil rights whereby a declaration of intent can be used as a screen or defense for actual discrimination. The 'separate but equal' principle is no longer a legitimate argument in civil rights cases."
(Pet. App. 59; A. 390).

This view was echoed by the Court of Appeals for the Fifth Circuit dealing with sex discrimination against males in *Hailes v. United Air Lines*, 464 F. 2d 1006, 1009 (5th Cir. 1972):

> "... the placing of the ad in the 'Help Wanted —Female' column without a corresponding ad in the 'Help Wanted—Male' column so plainly indicates a preference for females it cannot be neutralized by the self-conferred title of 'Equal Opportunity Employer.'"

This Court has refused to exalt form over substance in other civil rights cases. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 236 (1969); *Daniel v. Paul*, 395 U.S. 298, 301-02 (1969).

Moreover, as the Commission pointed out, the United States Equal Employment Opportunity Commission, the United States Department of Labor, the Civil Rights Commission of Colorado, and the Nebraska Equal Opportunity Commission have all ruled that the placement of an advertisement in columns headed "Male" or "Female" will be considered an expression of discrimination based on sex (Pet. App. 11-12).

Placing an ad for a job that does not carry a bona fide occupational exemption in a column with a sex-designated heading itself is discriminatory. Just as this Court refused to allow Louisiana to place racial labels on candidates for political office in *Anderson v. Martin*, 375 U.S. 399 (1964), because of their use as a discriminatory vehicle, so too the Pittsburgh Ordinance prevents sex labels for the same reason.

Even if separate were not inherently unequal under the Ordinance, the testimony from petitioner's own Classified Ad Manager, Robert Seli, when called as for cross-examination by Complainant, amply proves that employers who advertise in the "Jobs-Male Interest" or "Jobs-Female Interest" columns are expressing a preference based on sex (A. 125-26).

> "Q. As far as employment opportunity ads are concerned, do your takers have the discretion to place jobs in any particular column if the advertiser does not express any preference?
>
> A. No sir, most of the people, who call in have a preference. Let's put it this way. They know where they want the ad to run—automobile or real estate or male interest or female interest. They express this interest where they would like to have this ad placed. In what category. At times, when they do not express a preference, we ask them where they would prefer to have it placed.
>
> Q. If the advertiser clearly expresses a preference for male or female, the Press abides by the preference expressed by the advertiser?

A. Yes, but there is a little difference here. If somebody asks to place a help wanted ad under automobile advertising, we will not accept it. It has to run under help wanted. It's a job offering. It's run under opportunities.

Q. When no preference is expressed by advertisers, you then solicit from the advertiser a response to whether he has a preference?

A. Yes, where they would prefer to have it placed.

Q. In case there is no preference expressed, even after solicitation, who then at the Pittsburgh Press decides which column it goes in?

A. I don't think we have this problem, really.

Q. In each case there is an expression of preference by the advertiser?

A. Yes."

Again, the same sort of testimony appears in Mr. Seli's direct testimony in petitioner's case (A. 173):

"Q. Is this the only type of—if I may use the word—education for your advertisers? Do you then proceed to tell them of the several categories that should go under this or that, take your choice?

A. We tell them where the majority is—or we try to find out what type of a person they are looking for. Are they looking for a man, or are they looking for a woman? They know this. And *they are interested or more interested in a man or more interested in a woman.* They

know this, and they state this. This is where they want it." (Emphasis added.)

The discrimination inherent in placing an ad in a sex-segregated column is particularly apparent when it is recognized, as the Commission pointed out (Pet. App. 10), that petitioner has not simply a Male Column and a Female Column, but a "Male-Female" column. An employer not wishing to discriminate need only advertise in the "Male-Female" column.

Moreover, while petitioner euphemistically labels the columns "Jobs-Male Interest" and "Jobs-Female Interest", these are the same columns that prior to October, 1969, were labeled "Male Help Wanted" and "Female Help Wanted" (Pet. App. 10). Calling the "Male Help Wanted" column "Jobs-Male Interest" and adding a self-serving disclaimer no more changes the intrinsic nature of the column than calling a dog a cat makes it one.

Pages 305 to 353 of the Appendix are replete with advertisements, none of which carries a BFOQ exemption certificate, placed by advertisers in sex-segregated columns and thus violative of §8(e) of the Ordinance. Petitioner, in aiding and participating with such advertisers, is itself violating §8(j).

Thus, an argument that there is no proof that an advertiser discriminated at all is impaled upon the clear language of §8(e). This is an issue which petitioner has refused to face in the argument made in this Court. Instead, its argument is addressed to an alleged failure of proof that an advertiser discriminated in *hiring*.

## B. The "Presumption" Cases Are Inapplicable

The reason for requiring a showing that an employer discriminated in hiring, says petitioner (P. 25), is that the use of sex-segregated column headings does not have a real and substantial relationship to the denial of equal employment opportunity to women on account of sex. However, the "presumption" cases cited by petitioner in no way support the position it has taken. Those cases hold that a legislative determination that proof of one fact which is entirely lawful in itself, e.g., possession of a firearm as in *Tot v. United States*, 319 U.S. 463 (1943), cannot be evidence of the ultimate fact on which guilt of a crime is predicated unless there is a rational connection between the fact proved and the ultimate fact presumed. In the instant case, we have seen that placing a discriminatory advertisement is itself unlawful, under §8(e), totally apart from whether discrimination in hiring violative of §8(a) took place. The Commonwealth Court correctly recognized this distinction when it held:

> "If the advertising column headings here are discriminatory, they are in violation of the Ordinance per se, and there need not be a specific 'particular' on an actual discrimination suffered by any particular woman. If discriminatory, the column headings were in violation before the first woman actually suffered any act of discrimination." (Footnote omitted.)
>
> (Pet. App. 57; A. 388).

Thus, the facts proved (the discriminatory advertisement and petitioner's aiding it and participating in it) are themselves violations of law and "ultimate facts" in the language of the presumption cases.

**C. Since Advertising in Sex-Segregated Columns Is an Evil Within the Power of a Legislative Body To Eradicate, Petitioner Has Not Been Denied Substantive Due Process**

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Although petitioner contends (P. 26) that the Commonwealth Court equates sex-segregated advertisements with discrimination in hiring practices, it is not simply the Court which has done this; it is the ordinance in §8(e) thereof. If there is an absence of rational connection, which most assuredly there is not, it is in the Ordinance, not in the proceedings below. In fact, this is what petitioner states in its Summary of Argument (P. 10):

> "Due process requires that there be a reasonable relationship between the evil recognized and the manner in which a governmental body attempts to eliminate that evil."

It is difficult to believe, but in 1973, petitioner is asserting a *substantive* due process argument.

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**1. Petitioner cannot raise an issue for the first time in this Court.**

A substantive due process claim is not open to petitioner at this stage of the proceedings. Petitioner cannot, merely by the use of an all-inclusive heading like "Due Process", now change its argument.

## *Argument*

### (a) *Procedural, Not Substantive, Due Process Was Raised in the Petition for Certiorari*

Supreme Court Rule 23(c)(1) provides:

> "Only the questions set forth in the petition or fairly comprised therein will be considered by the Court."

This Rule summarizes the practice in this Court throughout the years. See *Trailmobile Co. v. Whirls*, 331 U.S. 40 (1947); *Dickinson Industrial Site v. Cowan*, 309 U.S. 382 (1940); *Crown Cork & Seal Co. v. Ferdinand Gutmann Co.*, 304 U.S. 159 (1938).

Petitioner's due process argument in the petition for certiorari was a *procedural* due process argument. The quotation at page 16 of the petition from *Cole v. Arkansas*, 333 U.S. 196 (1948), specifically uses the words *"procedural due process"* (emphasis added).

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### (b) *Procedural, Not Substantive, Due Process Was Raised in the Courts Below*

Likewise, the due process argument before the Commonwealth Court was *procedural* due process. *Cole v. Arkansas* was quoted there also. Petitioner's brief dealt largely with the requirement that procedural due process apply before administrative bodies as well as courts.

This Court has often held that it will not consider issues not raised below. *Adickes v. S. H. Kress and Company*, 398 U.S. 144, 147 (1970), and cases cited therein. *Adickes* was a case arising from a

United States Court of Appeals. The instant case, arising from a state system, is the *a fortiori* case, when the natural respect which the federal system should accord the courts of a state is taken into consideration.

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**2. This Court is not a super-legislature.**

Petitioner contends that there is no rational relationship between the prohibition of advertising in sex-segregated columns and denial of employment opportunity to women on account of sex.

This argument, however, is presented to the wrong body. It should have been presented to the Council of the City of Pittsburgh when it adopted the Human Relations Ordinance. As this Court said in *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965):

> "We do not act as a super-legislature to determine the wisdom, need and propriety of laws that touch economic problems, business affairs or social conditions."

Petitioner would take us back to those unfortunate days when the Due Process Clause was used as the basis for this Court to strike down social legislation with which it did not happen to agree. *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) (holding unconstitutional a minimum wage statute); *Lochner v. New York*, 198 U.S. 45 (1905) (holding unconstitutional a maximum hour law).

In *Ferguson v. Skrupa*, 372 U.S. 726 (1963) and *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955),

this Court summarized its present position. In *Williamson*, Justice Douglas, for the Court, held:

> "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. See Nebbia v. New York, 291 U.S. 502; West Coast Hotel Co. v. Parrish, 300 U.S. 379; Olsen v. State of Nebraska, 313 U.S. 236; Lincoln Union v. Northwestern Co., 335 U.S. 525; Daniel v. Family Ins. Co., 336 U.S. 220; Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421. We emphasize again what Chief Justice Waite said in Munn v. Illinois, 94 U.S. 113, 134. 'For protection against abuses by legislatures the people must resort to the polls, not to the courts.'"
>
> 348 U.S. at 488.

In *Lincoln Union v. Northwestern Co.*, 335 U.S. 525 (1949), this Court upheld the constitutionality of a North Carolina statute and a Nebraska constitutional amendment prohibiting employment discrimination against non-union members and forbidding employers from entering into contracts obligating themselves to exclude persons from employment because they were or were not union members. The union contended that the prohibition against contracts requiring the employer to refuse to hire or retain non-union workers was a violation of due process. This Court replied that the provision merely provided a

method to aid enforcement of the heart of the laws, the requirement that employers not discriminate. Similarly here the prohibition against discriminatory advertising provides a method to aid in enforcement of the heart of the law, the anti-discrimination requirement.

This Court went on in *Lincoln* to consider whether the due process clause prohibits a state from passing laws to safeguard the rights of non-union workers to get and to hold jobs, free from discrimination. Rejecting the *Adkins* and *Lochner* line of cases, this Court held that states may legislate against injurious economic and social practices unless such legislation runs afoul of some specific federal constitutional or statutory provision. Just as states have power to prohibit discrimination against non-union members, they have power to prohibit discrimination against women. As stated in *Williamson v. Lee Optical Co.*, supra, at 487-88:

> "... it is for the legislature, not the courts, to balance the advantages and disadvantages of the [legislation] ... It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."[8]

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[8] *Roe v. Wade*, 41 LW 4213 (1973) and *Doe v. Bolton*, 41 LW 4233 (1973) are not to the contrary. These cases struck down state abortion statutes held by this Court to violate a right of privacy encompassed within the liberty of the Fourteenth Amendment. Justice Blackmun for the Court began by paying heed to Justice Holmes' dissent in *Lochner v. New York*, supra, 41 LW at 4214. Justice Douglas, con-

**3. Prohibition of sex-segregated want-ads is a rational means of preventing discrimination in employment.**

We have seen that both Title VII of the Civil Rights Act of 1964, dealing with the elimination of employment discrimination, and the Civil Rights Act of 1968, dealing with the elimination of housing discrimination, have viewed the prohibition of discriminatory advertising as a rational means of achieving these ends. Likewise, some thirty-six states have prohibited discriminatory advertising. Lab. Rel. Rep. (FEP) 451.

Furthermore, in Part I of this Brief, we have cited numerous cases, dealing with cigarettes, alcohol and other disfavored products, which have sustained pro-

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curring, pointed out forcefully, 41 LW at 4243 n.4, that neither the abortion cases nor *Griswold v. Connecticut*, supra (in which he was the author of the Court's opinion), dealing with the particular right of privacy, reintroduced the substantive due process concept whereby state regulation of business and commercial enterprises would be held unconstitutional because the Court disagreed with the economic or social theory upon which the legislation was based. *But see* Justice Stewart's concurring opinion in *Roe*, 41 LW at 4230-31, adhering to his dissenting opinion in *Griswold*.

Even if a compelling state interest were required here, as in *Roe* and *Doe*, the elimination of sex discrimination surely supplies that interest.

Moreover, *Roe* and *Doe* can be read as a recognition by this Court, as it recognized in *Reed v. Reed*, 404 U.S. 71 (1971), and as the City of Pittsburgh recognized in its ordinance, that women can no longer be accorded second-class citizenship status. (Footnote added.)

hibitions against advertising to achieve a valid societal goal.

More specifically as to sex-segregated want-ads, we have seen that the placing of such an ad "plainly indicates a preference," *Hailes v. United Air Lines*, supra, at 1009, and that numerous agencies and commissions, including the United States Equal Employment Opportunity Commission [EEOC] and the United States Department of Labor, have ruled sex-segregated want ads to be discriminatory and unlawful. See Boyer, *Help-Wanted Advertising—Everywoman's Barrier*, 23 Hastings L.J. 221 (1971).

In *American Newspaper Publishing Association v. Alexander*, 294 F. Supp. 1100 (D.D.C. 1968), *motion for summary reversal denied*, 70 LRRM 3118 (C.A.D.C. 1969), the Court held that an EEOC guideline, providing that placing an ad in a sex-segregated column is a violation of §704(b) of Title VII, represented a reasonable interpretation of that Section.

In light of the many rulings that discriminatory want-ad advertising leads to discrimination in employment, the prohibition of sex-segregated want-ads, we submit, could have been thought by the Council of the City of Pittsburgh to be a rational means of preventing discrimination in employment. *Williamson v. Lee Optical Co.*, supra.

Moreover, although such evidence is unnecessary to sustain the legislative judgment, the record in the instant case provides strong support. We have al-

ready seen the testimony of petitioner's advertising manager that advertisers place their ads in the Male column if they are looking for a man and in the Female column if they are looking for a woman (A. 125-26, 173).

An advertiser, Mabel Anderson, the director of Cosmopolitan Placement, an employment agency, testified to the same effect (A. 118):

> "Q. In your experience in placing an ad, placing ads as personnel director in your experience does the placing of an ad under male interest in the newspaper indicate to you a preference by the employer as to sex?
>
> A. To a great extent, yes. . . ."

The transparent shift from a "Help Wanted" to an "Interest" format has also been discussed.

There is also testimony in this record of actual discrimination in hiring suffered by women who had responded to advertisements placed in the "Jobs-Male Interest" column in the Pittsburgh Press (A. 264, 52-53, 122-23).

Finally, the record in this case is replete with studies and sociological data showing the connection between discriminatory advertising and discriminatory hiring. The study performed by Dr. Bem, for example, showed that the placement of an advertisement in the "Male Interest" column, even when the disclaimer is much more prominent than it is here, will effectively discourage many female applicants who otherwise would be interested in the job (A.

236-41). The percentage of females hired for Federal Civil Service professional and administrative jobs increased markedly when the reference to sex was eliminated in advertisements (A. 102). As Congresswoman Griffiths of Michigan, discussing this very question, put it:

> "The inevitable consequence of putting the ad in the 'male' or 'female' column is to cut off at the outset any further reading of the ads under that label by persons of the opposite sex."
>
> 112 Cong. Rec. 13056 (1966).

Dr. Gardner's testimony is to like effect (A. 40).

Finally, the testimony of Catherine East, Executive Secretary of the Interdepartmental Committee on the Status of Women and of the Citizen's Advisory Council on the Status of Women, is relevant (A. 89-93). Both groups were established under Executive Order 1126 of the President of the United States. The former is composed of six Cabinet Officers, the Chairman of the Civil Service Commission, and the Director of the Office of Economic Opportunity. The latter is composed of twenty private citizens appointed by the President. The Council considered the question of sex-segregated want-ads and determined that they served only to advise prospective job applicants not to apply where they were not wanted, thus perpetuating discrimination. Furthermore, the Council found that the sex-segregated columns not only aided employers to discriminate, but encouraged them to put the sex label on jobs.

Surely, with the wealth of information showing the mertricious relationship between discriminatory advertising and discrimination in employment, it was not an irrational means to achieve equal employment opportunity for the Council of the City of Pittsburgh to enact legislation prohibiting such discriminatory advertising.

Petitioner's principal contention from the outset in this case has been that sex discrimination is somehow different from other forms of discrimination, and is not an evil. Petitioner's advertising manager testified on redirect examination (A. 180):

> "Q. Do you see any difference between the sex discrimination and the other discriminations that are part of the law?
>
> A. The difference between race and sex?
>
> Q. Yes.
>
> A. Definitely.
>
> Q. You do?
>
> A. There is a difference in sex. I don't see any difference in race and color."

He further testified (A. 181):

> "I think everybody believes or is against discrimination in other fields, but can't see where they are the same. There is a difference in sex where there is not a difference in religion, race or creed or color."

In closing argument before the Commission, counsel for petitioner asserted (A. 287):

"We all know what we see with our eyes, that men and women are much different in regard to employment than are whites and negroes, whites and blacks, christians and jews, mexican-Americans and American Indians; . . .

We feel that the biggest trap that this Commission could fall into is equating sex as just one other discriminatory medium."

Petitioner's contention that sex discrimination may e differentiated from racial or other types of dis-rimination, flies in the face of the Pittsburgh Ordi-ance. Section 4(B) of that Ordinance defines dis-rimination as "any difference in treatment based on ace, color, religion, ancestry, national origin, place f birth, or sex." Section 20 of the Ordinance makes an unlawful employment practice to discriminate ecause of sex. Compare Section 703(a)(1) of the ivil Rights Act of 1964, 42 U.S.C.A. §2000e-2(a)(1), which likewise refers to sex in a series of other nproper group classifications.

As stated in *Rosenfeld v. Southern Pacific Company*, 444 F. 2d 1219, 1225 (9th Cir. 1971):

"The premise of Title VII, the wisdom of which is not in question here, is that women are now to be on an equal footing with men."

Throughout these proceedings, petitioner has not en able to accept the proposition that equal does deed mean equal where men and women are con-rned. It recoils from the consequences of its posi-n and refuses to admit that if its position is cor-

rect, column headings labeled "Jobs-White Interest" or "Jobs-Christian Interest," are permissible (Petitioner's Brief, p. 26). Yet the Ordinance treats sex discrimination exactly the same as it treats racial or religious discrimination.

Perhaps the explanation for petitioner's chameleon-like changes of position on the due process question derives from its unsuccessful search to find a theory that will allow it to continue to implement its position that sex discrimination in employment is somehow different from other forms of discrimination.

**D. Petitioner Had Notice of the Charges Against It Sufficient To Comport With the Requirements of Due Process**

**1. The question is not before this Court.**

Petitioner has not argued here and has thus abandoned the claim made below that it was denied due process because the complaint did not allege a violation by a particular employer. Although American Newspaper Publisher Association, Amicus, attempts to resuscitate this issue, it may not do so. As stated in 4 *Am. Jur.* 2d, *Amicus Curiae*, §3:

> "An amicus curiae . . . must accept the case before the court with the issues made by the parties."

See *Moffat Tunnel Improvement Dist. v. Denver & S. L. Ry. Co.*, 45 F. 2d 715 (10th Cir. 1930), cert. denied, 283 U.S. 839 (1931); *State ex rel. Nesbitt v. Ford*, Okla., 434 P. 2d 934 (1967); *Phoenix v. Phoenix Civic Auditorium & Convention Center Asso.*, 99 Ariz. 270, 408 P. 2d 818 (1965); *Gem Stores, Inc. v. O'Brien*, Mo., 374 S.W. 2d 109 (1963); *Long v. Odell*, 60 Wash. 2d 151, 372 P. 2d 548 (1962); *State by Clark v. Applebaum's Food Markets, Inc.*, 259 Minn. 209, 106 N.W. 2d 896 (1960).

Moreover, the issue which the Amicus seeks to raise on its own is one which is appropriate only to the party involved. If petitioner is satisfied at this point that it has not been deprived of any legal right based on the notice given it in the complaint,

Amicus has no right to insist upon a determination of an issue not properly before this Court.

Perhaps petitioner was convinced by the Commonwealth Court decision that such a hypertechnical position was incorrect. The Commission from the outset indicated its willingness to grant petitioner additional time to prepare its case, if it desired, after complainant's case was presented (A. 23, 150). In fact, petitioner's case did not begin until nearly a month after complainant's was completed (A. 152-53). It is patent that any argument based on lack of notice is groundless. The Commonwealth Court quite properly held that the proper test was "fairness", whether petitioner had sufficient knowledge of the charge against it to enable it to defend, and ruled that the complaint was sufficiently specific under this test of fairness (Pet. App. 56; A. 387).

Possibly petitioner was desirous, as are respondents, of resolving the basic issues in the case so that this long process of litigation need not be repeated. In any event, the issues of the sufficiency of the complaint and adequacy of notice thus are not before this Court.

---

**2. A specific advertiser whom petitioner aided need not be alleged nor proven.**

The Amicus argues that a violation by a particular advertiser whom petitioner aided was not alleged, that one cannot aid unless there is a principal, and that such defect has not been cured by the proof because the proof does not show a particular employer aided.

Even if we were dealing with a *criminal* complaint, which we are not, the Amicus' position would be untenable. It is settled law, in the criminal area, that:

> "It is not prerequisite to the conviction of the aider and abettor that the principal be tried and convicted or in fact be identified."
>
> *United States v. Provenzano*, 334 F. 2d 678, 691 (3d Cir.), cert. denied, 379 U.S. 947 (1964).

See *Gray v. United States*, 260 F. 2d 483, 484 (D.C. Cir. 1958) (panel including Judge, now Chief Justice, Burger); *Meredith v. United States*, 238 F. 2d 535, 542 (4th Cir. 1956); *Colosacco v. United States*, 196 F. 2d 165, 167 (10th Cir. 1952); *Von Patzoll v. United States*, 163 F. 2d 216, 219 (10th Cir. 1947).

Here, the Commission found as a fact, based on the testimony of petitioner's advertising manager, that petitioner ran 248,000 help-wanted advertisements in 1969 (Pet. App. 15). It further found that 25% of the ads were placed by advertisers based in the City of Pittsburgh (Pet. App. 15). Approximately 95% of the employment advertisements are placed in the "Jobs-Male Interest" or "Jobs-Female Interest" columns as opposed to the "Male-Female Help" column (A. 35). Thus, tens of thousands of ads violate the City Ordinance and many of the rest violate the Pennsylvania statute.

It is thus clear that advertisers placed ads in sex-segregated columns thousands of times (see pages 305

to 353 of the Appendix for many examples). Petitioner aided and participated with them on each occasion. Even measured by criminal standards, petitioner has not been deprived of any right.

This is not a criminal action, but a civil proceeding seeking to prevent petitioner from continuing its practice. The Commission itself has no power to impose any fines or criminal penalties. See §14 of the Ordinance (A. 431). A criminal prosecution may be instituted before the minor judiciary by the City Solicitor. The question is not whether any *particular* advertiser was aided but rather whether petitioner is to be allowed to continue to aid advertisers who place discriminatory ads. If no advertiser places a discriminatory ad, then petitioner is not affected in the least by the order below.

The Commission's order in this civil proceeding sought to reach the root source of the discrminatory advertising. The ordinance has no requirement that enforcement proceed against the employer as well as the newspaper. In both *United States v. Hunter*, supra, and *Holmgren v. Little Village Community Reporter*, supra, the proceedings were against the newspapers only, not against those who placed the ads. It is an elmentary principle of law that the failure to prosecute all violators does not render an action against one who has violated the law discriminatory or improper. *United States v. Hunter*, supra, at 220.

The evil of sex discrimination has been recognized by the Equal Rights Amendment to the Pennsylvania Constitution, Art. I, §27, adopted May 18, 1971,

P.S. (Const.) Art. I, §27, by the Congress of the United States in proposing for ratification an Equal Rights Amendment to the United States Constitution, and by this Court in *Reed v. Reed*, 404 U.S. 71 (1971).

Respondents have determined that one of the best methods to achieve the eradication of this evil is to proceed against those who enable discrimination to flourish, by publishing discriminatory advertisements. Such a method is nowhere prohibited by the ordinance, nor is it prohibited by the Constitution of the United States.

## CONCLUSION

Wherefore, for the foregoing reasons, Respondents respectfully request that the Order of the Commonwealth Court be affirmed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

**October Term, 1972**

**No. 72-419**

PITTSBURGH PRESS COMPANY,
*Petitioner,*

v.

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS and the CITY OF PITTSBURGH,

and

THE NATIONAL ORGANIZATION FOR WOMEN, INC.,
*Respondents.*

ON WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

## BRIEF FOR THE NATIONAL ORGANIZATION FOR WOMEN, INC. INTERVENOR-RESPONDENT

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ON WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA.

## BRIEF FOR THE NATIONAL ORGANIZATION FOR WOMEN, INC. INTERVENOR-RESPONDENT

### Questions Presented

I. Does application to newspapers of a prohibition against sex-segregated want ads violate the First Amendment?

(Answered in the negative by the court below.)

II. Was petitioner denied due process of law by the commission order prohibiting the use of sex-segregated want ad columns?

(Answered in the negative by the court below.)

## Statement of the Case

Respondent, The National Organization for Women, Inc., adopts in full the Statement of the Case set forth in the Brief filed by Respondents, The Pittsburgh Commission on Human Relations and the City of Pittsburgh.

## Summary of Argument

### I.

Free access by women to the employment market is required by the Equal Protection Clause of the Fourteenth Amendment. Exercise of the police power is appropriate to this end in order to break the cycle of poverty and second-class citizenship in which women have been trapped.

The inclusion of a prohibition against discrimination by reason of sex in Pittsburgh's Human Relations ordinance was reasonable in terms of the strong public policy of the Commonwealth of Pennsylvania in favor of equal rights for women. The prohibition of job advertising which discriminates against women does not infringe upon Petitioner's First Amendment rights, since the want-ad section of the newspaper is a commercial operation which can properly be regulated under statutes of general applicability serving a public interest.

The burden placed upon the Press by the order appealed from is incidental, since Petitioner's editorial views can readily be expressed in other sections of the newspaper.

Regulations pertaining to the commercial aspects of the newspaper business have been sustained by this Court in a long line of decisions commencing with *Valentine v. Chrestensen*, 316 U. S. 52 (1942). Moreover, the *manner* in which First Amendment rights are exercised is not beyond regulation, particularly where, as here, the regulation is in furtherance of women's right to equal protection.

II.

The changing role of women in the labor force is evidenced by data from the 1970 census, which demonstrates that while women constitute 37% of the employed population most of them are in lower-paying jobs. The connection between this fact and discrimination against women in employment has been generally recognized, as has the discriminatory effect of sex-segregated want ad advertising.

Petitioner has not been denied due process by the order appealed from, since the prohibition of want ad sex-segregated column heads bears a reasonable relationship to an evil which the City of Pittsburgh sought to remedy in furtherance of the equal protection of the rights of women.

## ARGUMENT

### I. Application to newspapers of a prohibition against sex-segregated want ads does not violate the First Amendment.

The National Organization of Women, Inc. (NOW) filed its complaint with the City of Pittsburgh Human Relations Commission in the belief that free access by women to the employment market is of crucial importance if women are to reach the status of equality mandated by the Equal Protection Clause of the Fourteenth Amendment. This is not a case about sex-segregated washrooms. Rather, it is

a case about equal employment opportunity for women, and the exercise of police power to break the cycle of second-class citizenship and poverty in which they have been trapped by the traditional community roles assigned to them in a male-dominated society.

The problem of discrimination in employment is one of significant scope. The ordinance here involved, adopted in 1967 by the Council of the City of Pittsburgh, prohibited discrimination in employment, housing, public accommodations and other areas of inter-group relations by reason of race, color, religion, ancestry, national origin or place of birth. The ordinance was amended in 1969 to include discrimination on the basis of sex. A legislative finding of the existence of sex discrimination and a declaration of the City's public policy against discrimination on the basis of sex supported the amendment (Pet. App. 105-108).

The Pittsburgh ordinance, in section 8(e), expressly prohibits employers from advertising job opportunities in a manner which indicates "any preference, limitation, specification or discrimination" based on sex (Pet. App. 8). The ordinance also contains, in section 8(j), a prohibition against any person (defined in the ordinance to include corporations) from aiding or participating in such discrimination (Pet. App. 94a). The Commission held that the publication of want ads segregated by sex was a violation of the latter subsection and this holding was sustained by the Pennsylvania courts.

Petitioner argued before the Commission and the Pennsylvania courts that the headings "Male Interest" and "Female Interest" simply reflected the preference of men and women for certain types of jobs, and that the column headings represented the paper's editorial judgment that the

best interests of both advertisers and readers are served by an arrangement enabling both sexes to locate easily the possible jobs in which they might be interested.

Throughout these proceedings, Petitioner has not challenged the constitutionality of the ordinance on its face but simply its constitutionality as applied to the Pittsburgh Press. The issue here, therefore, is whether a newspaper may be enjoined from publishing want ads classified in sex-segregated columns, as against Petitioner's claim that its First Amendment rights are violated thereby.

The Commonwealth Court, in denying First Amendment protection to sex-segregated want-ad columns, noted that both Petitioner and the American Newspaper Publishers Association, *Amicus*, agreed that in the absence of an exemption, the Press could not utilize column headings such as "Jobs-Black Interest" or "Jobs-Catholic Interest", etc. (Pet. App. 60). They thus conceded the discriminatory character of the labelling insofar as race and religion are concerned. The courts below held that "Male Interest" and "Female Interest" were equally objectionable.

What Petitioner seems to be saying is that the Ordinance is constitutional, employers cannot discriminate in the text of their ads on the basis of sex, and column headings tending to exclude other categories of persons protected by the Ordinance are discriminatory and hence illegal, but such headings are *not* discriminatory when applied to women.

Under the Pittsburgh Ordinance and comparable provisions in the Pennsylvania Human Relations Act, 43 P. S. 955 (b)(2), an employer is expressly prohibited from advertising for a male or female employe unless he has first been given an exemption based upon a finding that

sex is a bona fide occupational qualification (BFOQ) for the job advertised. The Pittsburgh Ordinance in Section 7(d) provides specifically for the issuance of exemption certificates, but as of the time of the Commission hearings in this case no exemption on sex grounds had been applied for by any employer (Pet. App. 15). Thus, no advertiser could legally, at the time of the Commissioner's order, place an employment ad indicating a preference as to sex.

Petitioner's use of the column headings "Male Interest" and "Female Interest" thus affords employers an opportunity to do indirectly what they are not permitted to do directly—indicate whether they wish to hire a man or a woman. Testimony at the Commission hearing made this clear. Called as for cross-examination, Petitioner's Classified Ad Manager, Robert Seli, testified that prospective advertisers were asked under which of the three available categories the ad should appear: "Male Interest", "Female Interest", "Male-Female". If the advertiser was uncertain, he was asked whether he was looking for a man or a woman. In each case, Mr. Seli testified, there was an expression of preference by the advertiser (A. 125-126).

Thus, the employer preference for one sex or the other could be expressed just as clearly through column headings designated male or female "interest" as could ads under headings "Black Interest" or "Catholic Interest". The indication that this is recognized by prospective employers who use Petitioner's want ad columns is indicated by the column space of ads appearing under the various headings. Testimony at the hearing established that the "Male Interest" section has about 1,600 column inches, the "Female Interest" about 400, and the "Male-Female" about 100 column inches (A. 33). Accordingly, if Petitioner is correct in its assumption that its readers are interested in

only certain kinds of jobs women will read less than a fourth of the column inches of job opportunities.

It is this kind of job channeling, at the employer's request, which Petitioner is here asserting its right to continue. Its claim for First Amendment protection, based upon its position that want ad hearings represent social commentary which is entitled to the same protection as its editorial page and its news columns, is, to use Mr. Justice Harlan's phrase in another context, "little short of fanciful".[1]

There is no necessity for NOW to burden this Court with a full review of the cases involving First Amendment rights as applied to commercial advertising. This has been done comprehensively in the brief for the other Respondent, the Pittsburgh Human Relations Commission and the City of Pittsburgh; NOW is in complete agreement with the position taken therein. A response to certain of the arguments made to Petitioner may, however, be in order.

Petitioner has cited *Branzburg v. Hayes*, 92 S. Ct. 2646 (1972), a case involving newsmen's constitutional privilege from giving grand jury testimony. The use of this case as authority supportive of its claim is inapposite. Mr. Justice White, speaking for the majority and reviewing the present status of the law reiterated this Court's rule that a newspaper has no special immunity from the application of general laws, citing *Associated Press v. NLRB*, 301 U. S. 132-133 (1937), and holding as follows:

> It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal stat-

[1] *Oregon v. Mitchell*, 400 U. S. 112, 212 (Concurring and dissenting opinion).

utes of general applicability. Under prior cases, otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed.

In the instant case, the Ordinance in question is of general applicability and serves a substantial public interest. At most, if the Court sustains the decision appealed from, the Press will have only the incidental burden of being required to change the headings of its want ad columns. It will still be free to express its editorial view that the "existing *de facto* division of employment between males and females" affords proper basis for classifying its want ads, since the division will *"generally* reflect job interest and qualifications along sex lines." (Pet. Brief 26-27). The difference will be that this opinion will have to be expressed on its editorial page, or possibly in its news coverage, not in its Classified Ads.

This "incidental burden" must be balanced, as Petitioner concedes, against the substantial public interest represented by Pennsylvania's policy against discrimination on the basis of sex. In July, 1969, the Pennsylvania Human Relations Act was amended to add "sex" to the statute which, since 1955, had prohibited discrimination on the basis of race, color, religious creed, ancestry, age and national origin. The Ordinance here in question was passed the same month.

The following year the Pennsylvania legislature passed for the second time a proposed amendment to Article 1 of the Pennsylvania Constitution, which was submitted to the voters at the election held May 18, 1971. It provided: "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual". The voters of Pennsylvania

approved the Amendment. While the Amendment has no direct effect upon this litigation, it is of significance in determining the issue of whether the state interest is, in fact, a substantial one.[2]

It was with this history of support for equal rights for women in mind that the Commonwealth Court wrote that want-ad column heads should be asexual, because this would represent "the highest degree of societal commitment to the ideal of sexual equality" (Pet. App. 61). Contrary to Petitioner's argument (Pet. Brief 21), headings which have the effect of indicating that the jobs listed are available only to men (or women) clearly aid in discrimination. Particularly this is so when the headings here involved replaced the captions used prior to October, 1969, "Male Help Wanted" and "Female Help Wanted". Moreover, an intent to discriminate would seem to be irrelevant. Chief Justice Burger noted in *Griggs v. Duke Power Co.*, 401 U. S. 424, 432 (1971), that the federal Civil Rights Act of 1964 was directed "to the *consequences* of employment practices, not simply the motivation".

Petitioner's attempt to distinguish this case from *United States v. Hunter*, 459 F. 2d 205 (4th Cir.) *cert. denied* 93 S. Ct. 235 (1972) must fail. There the constitutionality of a state statute prohibiting discriminatory housing advertisements was sustained against the newspaper publisher's claim to First Amendment rights. The Court of Appeals relied on the long line of authority commencing with *Valentine v. Chrestensen*, 316 U. S. 52 (1942), sustaining regulation of the commercial aspects of the newspaper business, and held that an ad containing suspect racial designations in violation of the statute communicated an

[2] Pennsylvania has also ratified the proposed federal Equal Rights Amendment.

intent which the publisher could readily "divine". The choice of the word may have been unfortunate, but clearly in the instant case no divining is necessary, the determination of whether an ad is illegal—is there a BFOQ—is clear-cut. Petitioner need not screen the ads, although presently it does, to ascertain in which sex-designated column to place them.

Petitioner is correct in saying that the objection in this case was not to the ads themselves, as in *Hunter*, but to the "use of gender designated column headings" (Pet. Brief 20). But where, as here, the testimony establishes that the choice of the heading reflected the preference of the advertiser, and that the effect was discriminatory, the courts below properly concluded that Petitioner was actively aiding and participating in discriminatory advertising, which was specifically prohibited by the Ordinance.

The constitutionality of other federal statutes prohibiting discriminatory advertising has been sustained against First Amendment contentions: *Capital Broadcasting Co. v. Acting Attorney General*, 405 U. S. 1000 (1972), aff'g 333 F. Supp. 582 (D. C. 1971) (prohibiting cigarette advertising on any medium of electronic communication subject to the jurisdiction of the FCC); *New York State Broadcasters Association v. United States*, 414 F. 2d 990 (2d Cir. 1969), *cert. denied* 396 U. S. 1061 (1970) (prohibiting the broadcasting of lottery information).

Petitioner also asserts that "the Press is now being subjected to a more stringent test than in the area of obscenity" and being required to "prove empirically the truth of its opinion before it can be published" (Pet. Brief 18-19). The reference to Mr. Justice Brennan's discussion in *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harv. L. Rev. 1 (1965), if intended

to support either proposition, is misleading. As the article points out, all schools of thought as to the scope of the First Amendment are in agreement that "though the speech itself be under the first amendment, the manner of its exercise or its collateral aspects may fall beyond the scope of the amendment."

Respondents herein fully support Petitioner's First Amendment right to express its views on women's role in the employment market as determined by its conception of their interests. The opinion, whether true or false, simply should not be set forth in its want ad column headings, but on the editorial page or in the way in which it covers and prints the news. The *manner* in which Petitioner's First Amendment rights are exercised is not beyond regulation, particularly where, as here, the commercial regulation is in furtherance of women's constitutional right to equal protection in the field of employment opportunity.

**II. Petitioner was not denied due process of law by the Commission order prohibiting the use of sex-segregated want ad columns.**

Implicit in this case is the reluctance of Petitioner to accept the implications of the changing status of women in the field of employment which has occurred during the last decade. It is undoubtedly true that "most secretaries and nurses are women" (Pet. Brief, 26). It is also true that, of the 11.9 million jobs added to the labor force between 1960 and 1970, 65.3% were filled by women.[8] Their share of the increase was not confined to those jobs traditionally held by women. For example, 51.5% of the new laborers' jobs went to women, and women accounted for 28.6% of the

[8] All of the data contained in this paragraph is from a recently issued publication, *Occupation by Industry*, Census Bureau, Government Printing Office.

increase in managers' jobs. The 1970 census also reflected a sharp decline in private household workers, a field traditionally occupied almost exclusively by women, showing a net decrease of 570,236 workers. Overall, the census showed that 37.8% of all employed workers are women.

The changing character of the labor force points up the necessity for the law to reflect the new image of women. Forty-four (44%) per cent of all adult women now work outside the home, while the percentage of the total population who are females has climbed to over 52%. The extent to which women now participate in the labor market makes fair access to employment opportunities a matter of crucial importance.

It is, of course, true that an exceptional and strongly motivated woman will "buck the system" and move into fields where few have ventured before. But most women have been conditioned to accept the kind of job assigned to them by the society in which they live. It is only in the last few years that women have begun to escape the stereotypes common in the culture.

There once was a time when Negroes were thus "kept in their place" and, indeed, the residual remains of the segregation system still survive. Women, too, have been treated in many respects as second-class citizens, and nowhere is this more evident today than in the field of employment. The jobs women hold are typically the lower-paying ones. In 1970, 75.2% of employed women who were heads of households made under $7,000 a year as compared to only 29.1% of the men; 61.4% of the women earned less than $5,000, while only 17.8% of the men were paid less than $5,000. Twenty-one and nine-tenths (21.9%) per cent of all households headed by an employed person are headed by women.[4]

[4] Guide to Consumer Markets—1972/73, The Conference Board, Department of Commerce.

At the hearings before the Commission on Human Relations evidence was offered to substantiate the extent of the discrimination against women in employment, including a series of charts prepared by Catherine East, Executive Secretary of the President's Committee on the Status of Women (A. 357-374). Mrs. East and Mrs. Elizabeth Koontz, former President of the National Education Association and presently Director of the Women's Bureau, Department of Labor, both testified to the federal policy against sex discrimination in advertising (A. 139-141).

Testimony at the Commission hearing also established that the column headings used by the press tended to discourage women from even considering applying for the jobs advertised under the "male interest" heading. Dr. Sandra Bem, a professor and research scientist in psychology at Carnegie-Mellon University specializing in sex roles and sex differences, testified as to a test administered to fifty-two Carnegie-Mellon female students. Half of the women were given a booklet containing sixteen want ads from the Sunday Pittsburgh Press arranged under the column headings and with the usual "disclaimer" by the Press. The other half received booklets in which the same ads appeared in alphabetical order, with no sex labelling. All of the women were asked to rate *all* of the jobs to indicate their degree of interest, the rating to be made on the assumption that she had the necessary prerequisites for all of the jobs (A. 236-239).

The study showed that when the ads were sex-segregated as in the Press, only forty-six (46%) per cent of the women were as likely to apply for "Male Interest" jobs as for "Female Interest" jobs. But when the same jobs appeared in an integrated alphabetical listing with no reference to

sex, 81% of the women prefered the "Male Interest" to the "Female Interest" jobs. For example, the job of newspaper reporter fell in popularity from seventh most popular when it appeared in the integrated listing to nineteenth place when it was segregated and labelled as a "Male Interest" job.[8]

The experiment conducted by Dr. Bem thus reinforced the testimony of federal officials that discriminatory advertising places limitations upon the interest of women in seeking jobs outside the areas in which women typically have been employed. It showed also that the Press' "disclaimer" does not undo the damage done by the sex-segregated column headings.

In a similar type of case, involving sex discrimination against males, the Fifth Circuit commented as follows in *Hailes v. United Air Lines*, 464 F. 2d 1006, 1009 (5th Cir. 1972):

> ". . . the placing of the ad in the 'Help Wanted—Female' column without a corresponding ad in the 'Help Wanted—Male' column so plainly indicates a preference for females it cannot be neutralized by the self-conferred title of 'Equal Opportunity Employer.'"

It can hardly be denied that limitations upon free access to the employment market present an equal protection problem of considerable significance. Legislative bodies therefore had not only a right, but a duty under the equal protection clause to address themselves to the problem. The Commission and the courts below properly concluded, on the basis of the comprehensive evidence offered at the hearing, that allegedly "separate but equal" sex-designated

[8] The results of the tests were evaluated and found to be statistically significant at the .021 level of confidence by a chi-square test. (A. 239)

want-ad columns were in fact inherently unequal and thus should be prohibited. Compare *Brown v. Board of Education*, 347 U. S. 483 (1954); *Bolling v. Sharpe*, 347 U. S. 497 (1954).

Petitioner has argued that its want ad headings represent "a workable classification system" resulting from "the existing *de facto* division of employment between males and females" (Pet. Brief 26-27). NOW agrees with this proposition—that is exactly what the classification system is all about. But the primary purpose of civil rights legislation was to change the system of discrimination as to men and women. As stated in *Rosenfeld v. Southern Pacific Company*, 444 F. 2d 1219, 1225 (9th Cir. 1971):

> "The premise of Title VII, the wisdom of which is not in question here, is that women are now to be on an equal footing with men."

The Press' classification system defeats this purpose. The legislative intent is to free all persons from the chains of the past, whether forged by the bonds of slavery or fabricated by a society which treats women as the inferior sex.

That women as a group are no longer to be automatically disqualified on the basis of sex was recognized by this Court as recently as last term in *Reed v. Reed*, 404 U. S. 71 (1971). Therein, a unanimous Court invalidated a manatory provision of the Idaho probate court which required a man to be preferred over a women as administrator of the estate of a decedent in the same entitlement class. This Court found that a difference in treatment of persons in the same class solely on the basis of sex and without regard to the qualifications of the individual was a violation of the Equal Protection Clause.

The status of being unemployed is neutral and common to both men and women. In obtaining a job one sex should not be preferred over the other and want-ad classifications which suggest such preferences are contrary to law. As in *Reed v. Reed, supra* the wisdom of the legislation is not before this Court.

Respondent, NOW, submits that the Commission order, as affirmed by the courts below, is well within the scope of the ordinance and implements a public purpose under the Equal Protection Clause. It should therefore be affirmed.

## Conclusion

For all of the aforesaid reasons, Intervenor-Respondent NOW respectfully requests that the Order of the Commonwealth Court be affirmed.

Respectfully submitted,

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MICHAEL RODAK, JR.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-419

PITTSBURGH PRESS COMPANY, *Petitioner*

v.

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS AND THE CITY OF PITTSBURGH and THE NATIONAL ORGANIZATION FOR WOMEN, INC., *Respondents*

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE


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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-419

PITTSBURGH PRESS COMPANY, *Petitioner*

v.

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS AND THE CITY OF PITTSBURGH

and

THE NATIONAL ORGANIZATION FOR WOMEN, INC., *Respondents*

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The International Association of Official Human Rights Agencies hereby respectfully moves for leave to file the attached brief amicus curiae in this case. The consent of all Respondents has been obtained. The consent of the attorney for Petitioner was requested, but no response was ever forthcoming.

The interest of the International Association of Official Human Rights Agencies (IAOHRA) arise because it is an umbrella organization consisting of state and local civil rights agencies throughout the country. Included in IAOHRA's active membership are the following contributing agencies: State of Alaska Commission for Human Rights, Connecticut Commission on Human Rights and Opportunities, Iowa Civil Rights Commission, Kentucky Commission on Human Rights, Michigan Commission on Civil Rights, State of Maryland Commission on Human Relations, and the State

of Nebraska Equal Opportunity Commission. All the foregoing agencies are charged with protecting and advancing the cause of human rights including enforcement responsibilities for state civil rights laws dealing with such matters as employment, housing and public accommodations. These agencies are similar in function, if not identical, to the Pittsburgh Commission on Human Relations. The issues raised in these proceedings involves whether or not a newspaper may encourage constitutionally and statutorily forbidden discrimination. Also, significant questions are raised as to the extent to which states and localities may attempt to end discrimination by attacking not only those who discriminate but those who make discrimination possible. Reversal of the decision below could result in advertising which promotes sex and race distinctions affecting the enforcement responsibilities of state and local civil rights agencies.

Respectfully submitted,

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MICHAEL RODAK, J

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

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PITTSBURGH PRESS COMPANY,

*Appellant,*

*vs.*

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS AND THE CITY OF PITTSBURGH,

*and*

THE NATIONAL ORGANIZATION FOR WOMEN, INC.,

*Appellees.*

**On Writ of Certiorari to the Commonwealth Court of Pennsylvania**

## BRIEF FOR STATE OF NEW JERSEY AS *AMICUS CURIAE*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

**No. 72-419**

PITTSBURGH PRESS COMPANY,

*Appellant,*

*vs.*

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS AND THE CITY OF PITTSBURGH,

*and*

THE NATIONAL ORGANIZATION FOR WOMEN, INC.,

*Appellees.*

**On Writ of Certiorari to the Commonwealth Court of Pennsylvania**

## BRIEF FOR STATE OF NEW JERSEY AS *AMICUS CURIAE*

### Interest of the *Amicus*

The New Jersey Division on Civil Rights has adopted an Employment Advertising Rule prohibiting the maintenance of classified employment advertising columns seg-

regated on the basis of race, creed, color, sex, national origin, ancestry, marital status or age or the expression in the body of employment advertisements of such unlawful discriminatory preferences.

In April 1972, the New Jersey Division on Civil Rights conducted two days of public hearings on the proposed Rule. A representative of a major cooperating daily newspaper which was already operating with a single-column format testified that the proposed Rule was practicable, far more fair to readers than the segregated format and not economically detrimental to the newspaper. Representatives of private employment agencies also strongly supported adoption of the Rule. Numerous persons appeared on behalf of various women's organizations and detailed the severe discrimination in employment faced by women in New Jersey and the role of segregated advertising columns in fostering such discrimination. One witness stated that there are over 260,000 female heads of households in the State and that many of these women are not aggressive and therefore would not apply for jobs labeled "male" or "male interest," even though they may be fully qualified for the positions. She observed that the custom of segregating classified advertising columns had its genesis in an era when the public was insensitive to social injustice and when it was equally customary to segregate such columns on the basis of race.

The Division on Civil Rights adopted the proposed Rule on April 14, 1972. *See* N. J. Adminis. Code §13:11-1 *et seq.* The Rule, based on legislation substantially similar to sections 8(e) and (j) of Pittsburgh's Human Relations Ordinance (N.J.S.A. 10:5-12(c) and (e)), provides that it shall be unlawful for employers, employment agencies, unions and newspapers to publish or cause to be published classi-

fied employment advertisements under column headings segregated on the basis of sex, marital status, race, creed, color, national origin, ancestry or age. It also prohibits the expression in the body of any employment advertisements of any preference or limitation based on any of these criteria, unless such a restriction is grounded on a "bona fide occupational qualification." The Rule elucidates the latter phrase at some length, stating in part that it shall be interpreted "so that individuals will be considered for employment on the basis of their individual capacities and not on the basis of any characteristics generally attributable to their group." If an advertiser or newspaper is in doubt as to whether a particular generic characteristic is a bona fide qualification for a job, it may contact any of the offices of the Division on Civil Rights for guidance. The Rule requires the Division to respond promptly and to maintain records of all such advice rendered. A newspaper may in its discretion require all advertisers wishing to express any generic preferences to contact the Division, rather than do so itself. Any advertiser or newspaper relying on such agency device, or any newspaper reasonably relying on an advertiser's representation that it has obtained the Division's opinion that there is a bona fide occupational qualification for a particular job, is granted immunity from any charge of unlawful discrimination based thereon.

Two newspapers filed an appeal from the adoption of the Rule in the Superior Court of New Jersey, Appellate Division, which granted a stay thereof pending completion of the appeal. Prior to oral argument, and before this Court granted certiorari in the instant case, the Supreme Court of New Jersey granted certification of the appeal. The matter will shortly be argued in the latter court.

Although a due process issue has been raised by the appellants in the instant appeal premised on the alleged improper use of a conclusive presumption in the quasi-judicial proceeding below, this issue will not be addressed by the State of New Jersey because it appears to have no bearing on the validity of the New Jersey Employment Advertising Rule, which was adopted by exercise of the administrative agency's quasi-legislative powers. However, the First Amendment issue as raised is relevant to the validity of the New Jersey Rule and therefore the State desires to express its views on that issue as *amicus curiae*.

## ARGUMENT

**The freedom of the press guaranteed by the First Amendment is not transgressed by a state proscription on the publication of sex-segregated classified employment advertising columns by newspapers.**

The Court has long and consistently recognized that while the First Amendment protects the editorial freedom of the press, to the extent that "the press has business aspects it has no special immunity from laws applicable to business in general." *Mabee* v. *White Plains Pub. Co.*, 327 U. S. 178, 184 (1946). *Accord, Lorain Journal Co.* v. *United States*, 342 U. S. 143, 155-56 (1951); *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186, 192-93 (1946). As long ago as 1937 the Court observed:

> "The business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and

liberties of others. He must answer for libel. He may be punished for contempt of court. He is subject to the anti-trust laws. Like others he must pay equitable and non-discriminatory taxes on his business. The regulation here in question has no relation whatever to the impartial distribution of news." *The Associated Press* v. *N.L.R.B.*, 301 U. S. 103, 132-33 (1937).

The Court has also specifically held that while the First Amendment protects "freedom of communicating information and disseminating opinion," it "imposes no such restraint on government as respects purely commercial advertising." *Valentine* v. *Chrestensen*, 316 U. S. 52, 54 (1942). *Accord, Ginzburg* v. *United States*, 383 U. S. 463, 474 n. 17 (1966); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 265-66 (1964); *Breard* v. *City of Alexandria*, 341 U. S. 622, 641-45 (1951); *United States* v. *Hunter*, 459 F. 2d 205, 211-12 (4th Cir.), *cert. denied* —— U. S. ——, 93 S. Ct. 235, 34 L. Ed. 2d 189 (1972); *New York State Broadcasters Ass'n., Inc.* v. *United States*, 414 F. 2d 990, 998-99 (2nd Cir. 1969), *cert. denied* 396 U. S. 1061 (1970). Indeed, commercial advertising is so subject to the exercise of governmental police power that in *Lorain Journal Co.* v. *United States, supra*, the Court affirmed the granting of an injunction against a newspaper's refusal to accept advertisements from companies which placed ads with a competing radio station. Such a remedy would be forbidden in all but the most extraordinary circumstances where protected types of speech are involved. *Grosjean* v. *American Press Co.*, 297 U. S. 233, 245-49 (1936); *Near* v. *Minnesota*, 283 U. S. 697, 715-16 (1930).

No reason appears why these general principles should not govern the instant case as well. It must be emphasized that prohibiting a newspaper from publishing sex-

segregated employment advertising columns does not in the least mute or interfere with its formulation or expression of editorial policy or its dissemination of news. Any newspaper subject to such a regulation remains entirely free in its editorial or news columns to criticize vigorously the government's position and affirmatively to advocate that sex-segregated employment advertising columns are socially desirable. Nor can it reasonably be argued that the very act of publishing a sex-segregated advertising format itself expresses any editorial views. While the Court has held that appropriate types of symbolic speech enjoy constitutional protection (*e.g., Tinker* v. *Des Moines Independent Community School District*, 393 U. S. 503 (1969)), the use of a particular advertising format simply cannot reasonably be regarded as "speech." Every conscious action is preceded by a thought process culminating in a decision, but this consideration hardly raises every action to the dignity of protected speech. If it did, then presumably a purveyor of pornography could successfully maintain that his actions are immune from regulation because they symbolically convey his idea that pornography is beneficial to people (*cf. Ginzburg* v. *United States, supra*), an obstrusive door-to-door salesman that his sales techniques communicate his belief that his tactics serve the convenience of his potential customers (*cf. Breard* v. *City of Alexandria, supra*), a violator of the antitrust laws that monopoly is an economically desirable goal or that the antitrust laws are unjust (*cf. Lorain Journal Co.* v. *United States, supra*), or, for that matter, a terrorist hijacker that violent revolution is the best way to bring about desirable social change.

It is equally wide of the mark to assert that the state is attempting to make newspapers the unwilling agents of social change. Rather, the state is seeking merely to

prevent newspapers from using their commercial advertising columns to foster and perpetuate unlawful discrimination. Neither is it appropriate to urge that upholding the regulation involved in this appeal would open the door to broad governmental incursions on those activities which are protected by the First Amendment. The First Amendment will be secure so long as there is a judiciary with the power to act and the capacity to discern genuine threats to protected freedoms from legitimate regulations of non-protected activities. As the Court stated in a related context:

> "[Petitioner] seeks to bar all regulation by contending that regulation in a situation not presented would be invalid. Courts deal with cases upon the basis of the facts disclosed, never with nonexistent and assumed circumstances." *The Associated Press* v. *N.L.R.B., supra,* 301 U. S. at 132.

In summary, it is difficult to imagine any type of advertising more mundane or "purely commercial" than classified employment advertising. It is equally difficult to conceive of a more modest regulation thereof than a requirement which does not ban any advertising or, in the present case, even affect its content, but merely regulates one aspect of format. It is submitted that such regulations do not violate the guarantees of the First Amendment.

## CONCLUSION

**For the foregoing reasons, it is respectfully submitted that the judgment of the Commonwealth Court of Pennsylvania should be affirmed.**

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-419

Supreme Court, U.S.
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PITTSBURGH PRESS COMPANY,

*Petitioner,*

—v.—

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS AND THE CITY OF PITTSBURGH,

—and—

THE NATIONAL ORGANIZATION FOR WOMEN, INC.,

*Respondents.*

ON WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

## MOTION FOR LEAVE TO FILE A BRIEF AND BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND WESTERN PENNSYLVANIA CHAPTER OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

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—v.—

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS AND THE CITY OF PITTSBURGH,

—and—

THE NATIONAL ORGANIZATION FOR WOMEN, INC.,

*Respondents.*

ON WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

## MOTION OF THE AMERICAN CIVIL LIBERTIES UNION AND THE WESTERN PENNSYLVANIA CHAPTER OF THE AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

We respectfully move, pursuant to Rule 42 of this Court's Rules, to file the within brief amicus curiae. Counsel for the respondent has consented to the filing of this brief; counsel for the petitioner has refused.

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 180,000 members solely dedicated to defending the liberties guaranteed by the Bill of

Rights. In its 52-year existence it has been particularly concerned with protecting the freedom of the press, so that the great promise of the first amendment can be fulfilled. At the same time, the Union has been scrupulously dedicated to the equal protection of the laws, as guaranteed explicitly by the fourteenth amendment and implicitly by the fifth amendment.

In accord with these concerns, which are at the heart of the organization's purposes, we have filed scores of briefs in this Court in free press and equal protection cases. See, e.g., *New York Times Co.* v. *United States*, 403 U.S. 713 (1971); *Brown* v. *Board of Education*, 347 U.S. 483 (1954). With particular regard to the problem of discrimination on account of sex that is presented in this case, lawyers for the American Civil Liberties Union presented the appeal in *Reed* v. *Reed*, 404 U.S. 71 (1971), and acted as amicus curiae in *Frontiero* v. *Laird*, No. 71-1694, now pending in this Court.

The purpose of this brief is to suggest that the arrangement of help-wanted advertisements by sex is not protected by the first amendment and that the decision below, which upheld a ban on such discriminatory advertisements, should be affirmed. Because this is the first action in which the question has been presented to this Court, we wish to offer our reasons for concluding that the action of the court below does not impinge on the important protections guaranteed the press by the Constitution.

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In the

# Supreme Court of the United States

October Term, 1972

**No. 72-419**

Pittsburgh Press Company,

*Petitioner,*

—v.—

The Pittsburgh Commission on Human Relations and the City of Pittsburgh,

—and—

The National Organization for Women, Inc.,

*Respondents.*

On Writ of Certiorari to the Commonwealth Court of Pennsylvania

## BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND WESTERN PENNSYLANIA CHAPTER OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

### Interest of Amicus

The interest of the amicus appears from the foregoing motion.

### Statement of the Case

Amicus incorporates the Statement of the Case by the Respondent.

## ARGUMENT

### I.

**A newspaper's arrangement of help-wanted advertisements by sex classification is purely commercial activity not protected by the first amendment.**

The position of amicus in this case is twofold: (1) the free press protected by the Constitution is an imperative civil liberty that is basic to our system of government; (2) the grand mission of the first amendment does not encompass activity that is singularly and exclusively commercial in purpose and function.

The press is identified by the Constitution itself as special beneficiary of the "profound national commitment" to safeguard from governmental intrusion "uninhibited, robust and wide-open" debate on matters of public concern. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964).[1] But that profound commitment is demeaned when it is invoked as a shield against regulation in the public interest of activity that is wholly commercial in character. Rationally characterized, the column headings at issue in this case, "Jobs-Female Interest"/"Jobs-Male Interest," are not mini-editorials; rather, the help-wanted columns and their captions are singularly and exclusively commercial in purpose and function and therefore fall beyond the pale of the first amendment.

In *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942), this Court distinguished information communication and opin-

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[1] *See Near* v. *Minnesota*, 283 U.S. 697 (1931); *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946); *Mills* v. *Alabama*, 384 U.S. 214 (1966); *New York Times Co.* v. *United States*, 403 U.S. 713 (1971).

ion dissemination entitled to full protection under the first amendment, from "purely commercial advertising," a brand of communication subject to regulation in the public interest. The *Valentine* principle, now "enshrined among the commonplaces of constitutional law,"[2] has been tailored to appropriately narrow proportions. This Court has emphasized that the principle does not apply generally to activities that have a commercial aspect. The activity must be, as it is in the instant case, singularly and exclusively commercial in purpose and function. Communications, whether paid for or not, designed to convey ideas or opinions on political, religious, social, moral, and artistic matters are squarely within the ambit of the first amendment. Communications designed to attract customers for goods and services, on the other hand, ordinarily are not.[3]

As recently explained in *United States* v. *Hunter*, 459 F.2d 205, 211-13 (4th Cir.), *cert. denied*, 93 S.Ct. 235 (1972), freedom of communication of news and opinion enjoys the fullest protection of the first amendment. Paid advertisements are encompassed within this protection when they communicate grievances, seek financial aid for a cause, or involve other protected expression. But commercial advertisements in a business context, unrelated to dissemination of ideas, are not immune from regulation designed to implement national social or economic policy.[4]

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[2] Developments in the Law: Deceptive Advertising, 80 Harv. L. Rev. 1005, 1027 (1967). *See also* Note, Freedom of Expression in a Commercial Context, 78 Harv. L. Rev. 1191 (1965).

[3] See T. Emerson, The System of Freedom of Expression, ch. XII (1970).

[4] *See, e.g., Lorain Journal* v. *United States*, 342 U.S. 143 (1951); *Citizens Publishing Co.* v. *United States*, 394 U.S. 131 (1969). Inevitably, there is a gray area between. In keeping with the purpose of the first amendment, wide latitude is appropriate for

*Hunter* upheld a federal ban on newspaper publication of racially discriminatory advertisements for the sale or rental of a dwelling. In rejecting a first amendment claim bearing a marked similarity to the one asserted here, the court did not "balance" free press against a countervailing interest, but simply concluded, in accordance with the *Valentine* principle, that purely commercial speech was involved. Surely the same principle applies to advertisements that are sexually discriminatory, which are equally commercial in nature.

The straws tugged by petitioner in the instant case resemble the tactic regarded by this Court as subterfuge in *Valentine*. There, an advertiser sought to insulate his commercial handbill from prohibition under a local ordinance by printing on the reverse side a political protest that, standing alone, could not constitutionally have been banned. Here, petitioner presents similarly transparent avoidance arguments: protection by proximity and a claim of shorthand editorializing.

Had petitioner posted the help-wanted advertisements on a billboard or placard outside its office building, the challenged proscription would raise no specter of interference with a newspaper's editorial prerogative.[6] Similarly, if

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advertisements that in fact communicate information on issues of public concern. *Cf. Thornhill* v. *Alabama*, 310 U.S. 88 (1940); *Martin* v. *Struthers*, 319 U.S. 141 (1943); *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965). The special first amendment protection of the print media requires a degree of vigilance beyond that required with respect to media subject to broad federal regulatory authority. *See Banzhaf* v. *FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied sub nom. Tobacco Institute Inc.* v. *FCC*, 396 U.S. 842 (1969); *Friends of the Earth* v. *FCC*, 449 F.2d 1164 (D.C. Cir. 1971).

[6] *See Valentine* v. *Chrestensen, supra; Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490 (1949).

help-wanted pages were distributed as a separate journal so that the advertisements were the only "news," a press freedom claim would be implausible.[6] When help-wanted ads are included, as they are in the Pittsburgh Press, as a discrete portion of a newspaper, they remain a wholly distinctive feature and do not acquire protection through physical proximity to news, editorials or editorial advertisements of the kind involved in *New York Times Co.* v. *Sullivan, supra.*

Characterization of the separate "male"/"female" captions as abbreviated editorial comment defies common sense and is contrary to the evidence before the Commission and the Pennsylvania courts. The captions "Jobs-Male Interest"/"Jobs-Female Interest" contain no information or arguments that might contribute to public debate on sex roles in society.[7] Most significantly, however, the column arrangements do not reflect any judgment or even a passing thought by petitioner's editors or staff as to whether advertised jobs interest men or women or both. Petitioner's staff simply asks for the advertiser's preference and then follows the advertiser's instructions. According to the practice described, if an advertiser sought a woman for a "typically male job" and therefore requested placement of the ad under the "Female Interest" column, petitioner would comply. In short, the column headings are a convenience

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[6] *Cf. San Francisco Shopping News Co.* v. *South San Francisco,* 69 F.2d 879 (9th Cir. 1934).

[7] In glaring contrast to the purported editorializing by cryptic caption involved in the instant case is the advertisement conveying precise information on an issue of public debate involved in *Bigelow* v. *Virginia,* 213 Va. 191 (1972), jurisdictional statement filed, December 30, 1972.

offered employers with sex preferences. Any "judgment" involved in determining whether advertised jobs interest one sex or the other is the advertiser's, not the newspaper's. This judgment of course can be mistaken, and often is; in such a case the column headings are probably false and certainly misleading.[8]

Realistically described, then, petitioner arranges its help-wanted columns so that "editorial judgments" about job preferences can be made by employers and employment agencies. The service is plainly directed to the advertiser, not to the readers, whose interests are not ascertained. But this service does raise revenue for the paper and spares the advertiser the bother of attracting qualified applicants of the sex he does not want to hire, perhaps too the further bother of responding to an employment discrimination charge made by a qualified applicant of the unwanted sex.[9]

*Lorain Journal* v. *United States*, 342 U.S. 143 (1951), which held a newspaper publisher's attempts to control local advertisements to be a violation of the Sherman Act,

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[8] It is well established that false advertising enjoys no first amendment protection. *See, e.g., Donaldson* v. *Read Magazine*, 333 U.S. 178 (1948); *E. F. Drew & Co.* v. *FTC*, 235 F.2d 735 (2d Cir. 1956), *cert. denied*, 352 U.S. 969 (1957); Developments, 80 Harv. L. Rev. 1005 (1967). As to the effect of the advertisements here, see note 10, *infra*.

[9] *See* Want-Ads Tomorrow: Neutral With Respect to Sex, in Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Educ. of the Comm. on Educ. and Labor, 91st Cong., 2d Sess. pt. 2 at 894, 896 (1970). Even if the advertiser believed his column placement judgment was in the best interest of the unwanted sex, his belief, and the newspaper's indulgence of it, would be no more persuasive than the judgment of the advertiser in *E. F. Drew & Co., supra*, that people who bought margarine believing it to be a dairy product would benefit by virtue of the lower price.

rejected a claim of "editorial judgment" similar to that of the Pittsburgh Press. In *Lorain Journal* the right of the press to determine what advertisements it would accept was held subject to restriction when that determination was based on an unlawful economic practice. Here, the Press is asserting a similar right to circumvent the law, also premised on economic considerations. Advertisers who seek to discriminate on grounds of sex but are barred from indicating a sex preference within their own ad obviously find it preferable to advertise with the Press. Such considerations find no protection in the first amendment. This principle was recently reaffirmed in *Citizen Publishing Co. v. United States*, 394 U.S. 131, 139 (1969), where the Court said:

> Neither news gathering nor news dissemination is being regulated by the present decree. It deals only with restraints on certain business or commercial practices.

The judgment below does not impede petitioner from communicating its own judgment that, despite the documented chilling effect of sex segregated advertising,[10] most

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[10] *See* Bem & Bem, Sex-Segregated Want Ads: Do They Discourage Female Job Applicants, in Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Educ. of the Comm. on Educ. and Labor, 91st Congs., 2d Sess. pt. 2 at 891, 892-893 (1970):

> Do sex-segregated want ads discourage women from seriously considering those jobs which the Press classifies as "male interest"? Our results show this to be the case. When jobs were segregated and labeled on the basis of sex . . . only 46% of the women in this study were as likely to apply for "male interest" jobs as for "female interest" jobs. . . . But does this really reflect a true preference on the part of women for so-called "female interest" jobs? No, it does not. For when the same jobs appeared in an integrated alphabetical listing with

people prefer perpetuation of sex-typed occupational patterns. Petitioner may editorialize and report the news on this subject as it sees fit and it may publish editorial advertisements from others who oppose desegregated columns.

Finally, it should be stressed that the problem of reviewing advertisements for content presented in *Hunter*[11] is not a factor here. Under the decision below, no affirmative burden whatever is imposed on petitioner to screen for discriminatory statements. It is not called upon to "divine" whether a particular ad may be placed under a "male" column or a "female" column. It will encounter no risk of error in judgment on a particular ad. It is required to follow an unambiguous directive: unless the advertiser presents a bona fide occupational qualification exemption certificate from the Commission, the advertisement is to be placed under a heading that invites female and male interest.

In sum, amicus urges this Court to affirm the decision below with respect to the very narrow question presented. The first amendment does not protect a newspaper's pub-

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> no reference to sex, fully 81% of the women preferred the "male interest" jobs to the "female interest" jobs. . . .
>
> It seems clear [for example] that the newspaper editor who wishes to hire only male reporters—in violation of the law—can place his ad in the "male interest" column, secure in the knowledge that this will effectively discourage female applicants. It is in this way that sex-segregated want ads can "aid and abet" discrimination in employment on the basis of sex. . . .

*Cf. Donaldson* v. *Read Magazine, supra*, 333 U.S. at 189 ("Questions of fraud may be determined in the light of the effect advertisements would most probably produce on ordinary minds.").

[11] *See* 459 F.2d at 213.

lication of sex separated help-wanted advertisements, for this publication is singularly and exclusively commercial in purpose and function. A decision so circumscribed will take no "chip" out of the first amendment, for the right asserted was never part of the first amendment's protection.

## II.

**The due process objection to the decision below is without merit.**

Petitioner's resort to a substantive due process argument to invalidate the Commonwealth Court's construction of the statute is misplaced. This argument was not raised in the courts below or in the Petition for Certiorari, and is therefore not properly before this court at this time. See *Lawn* v. *United States*, 355 U.S. 339, 362 note 16 (1958), Supreme Court Rule 23 (1) (c).

On the merits, the claim is without basis. This Court has long held that where a state legislative choice is reasonable it will not substitute its view of the underlying social or economic policy. See, e.g., *Giboney* v. *Empire Storage & Ice Co., supra.* Prohibition of the column headings is plainly a permissible means of achieving the State's valid objective of preventing discrimination in employment. For example, in *Head* v. *New Mexico Board of Examiners*, 374 U.S. 424, 432, note 12 (1963), this Court rejected summarily a due process challenge to an order enjoining a newspaper from publishing a commercial advertisement prohibited by State law. See also *United States* v. *Hunter, supra.*

The Commonwealth Court found that the promotion of equal employment opportunity between the sexes was a

valid objective of state policy. Petitioners do not dispute this finding. They argue however that unlike columns arranged by race or nationality their arrangement of advertisements is tied to a rational differentiation in "job interest" based on sex:

> [T]he press believes that the employment patterns in this country *generally* reflect job interest and qualifications along sex lines. Most secretaries and nurses are women and most laborers and managers are men, and therefore it is not unreasonable to believe that most qualified applicants for a job advertised will be attracted from the men or the women presently filling such positions. Petitioner's Brief, at 26.

The Commonwealth Court rejected this argument, 287 A.2d 161, 168 (1972):

> Pittsburgh Press insists that this manner of arranging employment advertisements is oriented to the interests of persons seeking employment. The record does not support this contention. The record clearly demonstrates that this sex segregated system of want ad column classification is geared primarily to the interests and desires of employers.

The conclusion of the court below that advertisements of jobs in sex-segregated columns tended to perpetuate discrimination in employment is supported by the decisions of other courts, the Equal Employment Opportunity Commission, and Scholarly Studies.[12] This is a sufficient jus-

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[12] See, e.g., Bem & Bem, Sex-Segregated Want Ads: Do They Discourage Female Job Applicants, *supra*, note 10. See also the Model Anti-Discrimination Act approved by the Commissioners on Uniform State Laws, section 306(b)(3) (1966) (it is a discrim-

tification for prohibiting advertising policies which so clearly clash with the legitimate objective of the state statute. *Hailes* v. *United Airlines*, 464 F.2d 1006 (5th Cir. 1972); *United States* v. *Hunter*, *supra*.

Petitioner's final due process claim, relying on *Tot* v. *United States*, 319 U.S. 463 (1943), and *United States* v. *Romano*, 382 U.S. 136 (1965), is equally without merit. It is suggested that because an employer has not been shown to have discriminated against a woman the order against the newspaper cannot stand. But the *Tot* and *Romano* cases, which reversed convictions because evidence of guilt was presumed from facts having no relationship to the crime charged, are inapplicable for two independent reasons. First, the Court below found that, as a matter of law, the arrangement of help-wanted columns by sex aids in discriminatory advertising. This is plainly a justifiable inference because there is a rational connection between the fact proved (the segregated columns) and the fact presumed (discrimination). But it is unnecessary to rely on inference. There was ample evidence before the Commission as well as independent studies (see note 10, *supra*) justifying the finding that the Commission made and the court below upheld.

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inatory practice for "an employer or employment agency . . . . to make or use a written or oral inquiry or form of application that expresses a preference, limitation or specification based on sex of a prospective employee").

## CONCLUSION

**For the reasons set forth above the decision of the Commonwealth Court of Pennsylvania should be affirmed.**

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February 1973

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MICHAEL RODAK, JR., CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-419

PITTSBURGH PRESS COMPANY,

*Petitioner,*

v.

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS AND THE CITY OF PITTSBURGH,

AND

THE NATIONAL ORGANIZATION FOR WOMEN, INC.,

*Respondents.*

ON WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

## BRIEF FOR AMICUS CURIAE WOMEN'S LAW FUND, INC.

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ON WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

---

# BRIEF FOR AMICUS CURIAE WOMEN'S LAW FUND, INC.

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## INTEREST OF AMICUS CURIAE

en's Law Fund, Inc. is a non-profit corporation
e sole purpose of "bring[ing] women into full
tion in all activities of American life by securing

them their full legal rights under the Constitution." The Fund is particularly concerned with the problem of achieving equal employment opportunity for women, and, through its funding of litigation, Women's Law Fund, Inc. seeks to assist all women who are discriminated against solely because of their sex through illegal employment practices.

Millions of American working women are presently being denied equal access to the job market. Despite high economic motivation to work, women continue to be barred from non-traditional, often higher paying work roles. Newspapers which provide sex segregated ad columns, and employers who, in violation of federal law, prefer employees of a particular sex, persist in discriminatory practices.

The help-wanted column format utilized by the Pittsburgh Press and newspapers across the country provides vast commercial profit to publishing companies while serving as a shield of protection to hide the many employers who continue to discriminate.

It is timely for the Court, in the instant case, to pierce this shield of discrimination. In view of the pending resolution of the significant issues here raised and their precedent setting impact on the 31.5 million women now in the work force, the Fund wishes to present this *Amicus Curiae* brief to the Court.

## INTRODUCTION

The Pittsburgh Press has been accused of violating Section 8(j) of the Pittsburgh Human Relations Ordinance (sometimes hereinafter referred to as the Pittsburgh Ordinance or the ordinance) because of its discriminatory help-wanted advertising policy.

The Pittsburgh Commission on Human Relations, the Court of Common Pleas of Allegheny County, and the Commonwealth Court of Pennsylvania,[1] have all held that the newspaper, by publishing help-wanted notices in sex-segregated columns, did violate the ordinance.

The Pittsburgh Press claims that the advertising policy of the newspaper is editorial in nature, protected by freedom of the press as guaranteed by the First Amendment to the United States Constitution. This protection, according to the newspaper, prevents the Pittsburgh Ordinance from regulating its advertising help-wanted column headings. The Press further alleges a due process violation claiming that the ordinance does not apply to any act of a newspaper until an independent act of discrimination has been proven against one of its advertisers.

*Amicus,* Women's Law Fund, Inc., submits that the newspaper's help-wanted advertising policy is a commercial aspect of the newspaper, subject like other activities to governmental regulation and control. The testimony is replete with evidence of the discriminatory effect of the newspaper's advertising policy. An inspection of the Pittsburgh Ordinance, in particular, Sections 3, 8 and 11, substantiates the view that a newspaper enjoys no special exemption from the purview of the ordinance with respect to its classified advertising pages.

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[1]The opinion of the Pittsburgh Commission on Human Relations is found in the Appendix to the Petition for Writ of Certiorari at page 1a; the Opinion of the Court of Common Pleas of Allegheny County is found in the Appendix to the Petition for Writ of Certiorari at page 19a; the Opinion of the Commonwealth Court of Pennsylvania is reported at 4 Pa. Cmwlth. 448, 287 A.2d 161, *allocatur denied,* June 21, 1972 (Pa. Sup. Ct. 1972).

## ARGUMENT

### I.

### PROVISIONS OF THE PITTSBURGH ORDINANCE DO NOT IMPAIR THE FREEDOM OF THE PRESS.

#### A. Newspaper Advertising Is a Commercial Activity Subject to Governmental Regulation.

The First Amendment accords great freedom to the press and protection of this freedom is essential to the maintenance of our democratic society. However, the extent of protection to be accorded the press has a direct relation to whether its activity is editorial or commercial in nature. One issue presented to this Court for determination is whether under the First Amendment to the United States Constitution the decision to adopt separate classified advertising headings based on sex, being commercial in nature, is subject to control, or whether such a decision is a protected editorial activity.

Newspaper advertising, *per se*, is neither a commercial nor an editorial activity. Advertisements which communicate grievances, protest abuses or seek to enlist financial aid for a cause have been held to be protected expressions of First Amendment freedoms,[2] while restrictions on commercial speech are compatible with First Amendment guarantees.[3]

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[2] *See New York Times Co. v. Sullivan*, 376 U.S. 254, 265-266 (1964); *Smith v. California*, 361 U.S. 147, 150 (1959).

[3] *Jennes v. Forbes*, 351 F. Supp. 88, 96 (D.R.I. 1972). In addition, advertisements expressing a racial preference appearing in a purely commercial context are not granted these same protections. *See U.S. v. Hunter*, 459 F.2d 205 (4th Cir. 1972) *cert. den.* 93 S.Ct. 235 (1972); *Holmgren v. Little Village Community Reporter*, 342 F. Supp. 512 (N.D. Ill. 1971).

In holding that commercial advertising in a business context can and must be regulated, this Court has stated that, while

> freedom of communicating information and disseminating opinion [enjoys the fullest protection of the First Amendment] the Constitution imposes no such restraint on government as respects purely commercial advertising.[4]

The type of business subject to regulation has been defined "roughly" to encompass "the production and exchange of goods and services for profit, as distinct from the production or exchange of ideas on political, religious, artistic and similar matters."[5]

Where a newspaper conducts activities of both an editorial and business nature, the Fourth Circuit Court of Appeals has stated that "a newspaper will not be insulated from the otherwise valid regulation of economic activity merely because it also engages in constitutionally protected dissemination of ideas."[6] In *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416 (1945), this Court further stated:

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[4] *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942). *See Breard v. City of Alexandria*, 341 U.S. 622, 641-645 (1951); *New York State Broadcasters Ass'n. v. United States*, 414 F.2d 990, 998-999 (2nd Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970); *Banzhaf v. FCC*, 132 U.S. App. D.C. 14, (1968), *cert. denied, sub nom. Tobacco Institute v. FCC*, 396 U.S. 842 (1969); *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971), (three-judge court), *aff'd., sub nom. Capital Broadcasting Co. v. Kleindienst, Acting Attorney General*, 405 U.S. 1000 (1972).

[5] T. Emerson, *The System of Freedom of Expression* 414 (1970). *See also, Note, Freedom of Expression in a Commercial Context*, 78 Harv. L.Rev. 1191, 1192, 1194-5 (1965).

[6] *U.S. v. Hunter, supra*, note 2 at 212. *See Lorain Journal Co. v. United States*, 342 U.S. 143, 155-157 (1951).

> The fact that the publisher handles news while others handle food does not . . . afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate the laws regulating his business practices. 65 S.Ct. at 1418.

### B. The Practice of the Press Meets the Commercial Activity Test.

The Pittsburgh Press (hereinafter sometimes referred to as the "Press") is a profit-making corporation engaged in publishing a newspaper. Among its pages is a classified advertising section which provides notifications of job opportunities. The format of the newspaper provides three separate column headings available for selection by the advertiser. These columns are labeled "Jobs–Male Interest", "Jobs–Female Interest" and "Jobs-Male-Female Interest". An employer designates a placement preference for his advertisement or chooses one at the suggestion of the newspaper.[7] Activities similar in nature characterize most newspapers today.

The Press claims that the City of Pittsburgh, through its Human Relations Ordinance No. 75, as amended by Ordinance No. 395, is attempting to effectuate social change at the expense of the freedom of the press. National policy, as defined by Congress, the President and federal and state agencies[8] today requires effec-

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[7] Testimony of Robert Seli, (A-172-173).

[8] Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e; Executive Order 11246 as amended by 11375 (1967); Revised Order No. 4 (1971); EEOC Guidelines on Discrimination Because of Sex, 29 CFR Chap. XIV, §1604 as amended; Iowa, Civil Rights Act, Iowa Code Ann. §601 (1973 Supp.); Minn., State Act Against Discrimination, Minn. Stat. §363 (1971); New Jersey, Law Against Discrimination, N.J. Stat. Ann.

tuation of whatever social change is necessary to eliminate all discrimination, including discrimination based upon sex. However, the City of Pittsburgh, while imposing an obligation upon every person to comply with its policy as defined in Ordinance No. 75[9] in no way prohibits a newspaper from expressing its editorial views or from disseminating news and ideas to the public. The prohibition of aiding, inciting or participating[10] in any discrimination through a newspaper's commercial activity in no way restricts a newspaper's editorial comment protected by the First Amendment.

The Press suggests that the judgment utilized in determining advertisement placement under its three column headings is an expression of editorial opinion rather than a function of ordinary business judgment. The Press admits that the three men who decide ad placement bear the titles of Editor, Business Manager and Classified Ad Manager. (A-170a). The fact that two of

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Tit. 10, Ch. 5 (1972 Supp.); Human Relations Ordinance of the City of Pittsburgh No. 75, as amended by Ordinance No. 395, July 1969.

[9]The policy of the Pittsburgh Ordinance No. 75, as amended by Ordinance 395, is as follows:

AN ORDINANCE–Prohibiting discrimination in employment, housing, public accommodations, and other areas of intergroup relations in the social, cultural, and economic life of the City of Pittsburgh; requiring fair employment practices, fair housing practices and fair public accommodations practices by prohibiting discrimination in employment, housing and public accommodations because of race, color, religion, ancestry, national origin or place of birth; or sex; establishing a Commission on Human Relations in the Office of the Mayor and prescribing the powers and duties thereof; providing penalties, and revising and consolidating the ordinances relating thereto.

[10]*See, infra* at note 19, §8(j).

these three positions relate solely to economic and commercial operations is proof sufficient of the commercial nature of ad placement.

The argument of the Pittsburgh Press that its column headings constitute a service designed to respond to customer preference[11] and thus editorial in nature is lacking both in legal and logical justification. In the course of managing a newspaper, an editor functions on many levels and in many different capacities. His primary purpose is that of presenting the editorial viewpoint of his newspaper. At other times, he may function as a general supervisor of his subordinates in matters of broad nature, including, on occasion, some of business judgment. It is illusory, however, to accord the status of editorial opinion to all decisions flowing from an editor. A judgment relating to classified advertising concerns only the economic running of a newspaper. Many decisions made by a newspaper's editorial staff, (i.e., what weight paper to use, keeping the price at 10¢ a day rather than raising it to 15¢ a day) are made in an attempt to comply with customer preference. However, this fact does not elevate such decisions to the level of being protected editorial judgments. They are merely decisions made by an editor and his staff relating to business aspects of a newspaper.

The Press is in business to make a profit and the layout of the classified ad section of the newspaper is directly related to the amount of profit which the newspaper enjoys. By devising a scheme whereby advertisements for job opportunities are placed in separate columns depending upon whether the jobs are deemed to be

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[11] *See infra* for a discussion of the Press' response to customer preference.

generally of male or female interest, the Press is attempting firmly to secure the economic stability of its business. An employer wishing to bring an ad to the attention of all readers seeking employment[12] now must insert two if not three ads in the paper, thus causing the Press to enjoy an even greater profit. This is substantiated by the testimony of Mr. Leland P. Deck, a specialist in Personnel Management at the University of Pittsburgh, given at the January 15, 1970 hearing. (A-56a).

Q. Has [the University of Pittsburgh] ever had a complaint lodged against it by the Pittsburgh or Pennsylvania Human Relations Commission?

A. I have had a complaint filed against me with the Mayor's Committee on Human Relations.

* * * * *

Q. What was the nature of the inquiry of the complaint?

A. Well, as I understand, the complaint was that I was violating the Civil Rights Act by advertising in columns with a heading "Jobs for Men" or "Jobs for Women". And the settlement was that since it was necessary to get the kind of applicants we wanted to fill the vacancies which we have, it would be necessary to advertise where we would get the proper results . . . Sometimes we would put "Male" or "Female" itself if we were advertising in the "Male" Section or "Female" Section. That . . . increased my cost by about 10%.

[12] In addition, an employer may be forced to insert more than one ad in the paper in order to comply with Title VII of the Civil Rights Act of 1964, the EEOC Guidelines and the state and local fair employment ordinances.

Q. Is there a way of alleviating the expense factor of the University and to comply with the nature of the conciliation?

A. Well, the newspapers could change its classification system and perhaps the new system would be without critics.

Q. When the present system is constituted, you have no option or alternatives?

A. I have no practical options or alternatives. It costs about $11.00 in advertising to get one new qualified employee on the job, if we advertise in the Pittsburgh Press.

* * * * *

Q. Prior to the filing of the complaint, how did you list your want ads?

A. We would advertise for some jobs in the help wanted "male" sections. For some jobs we would advertise in both sections. For some jobs we advertised in the "female" section, and for some jobs we advertised in that neuter section, "male-female".

Q. Did you find this satisfactory?

A. We got the results for the cost of $11 per candidate. There were many cases where we had to advertise in two sections to get the results we wanted.

Q. Can you give us an explanation for that?

A. Well, if one is recruiting for a secretary and ninety-nine and nine-tenths percent of all secretaries in the community are female, we find we solve our problem by advertising in the section for females. If we are advertising for a engineer–we haven't even tried advertising in the female section on the presumption we would be

wasting our money. If we are advertising for a laboratory assistant, we may very well advertise one day in the male section, another day in the female section, and another day in the male-female section.

Q. May I ask, in that particular case, why you don't advertise in the "male-female" section?

A. Because that section, we believe, is looked at by job seekers for very limited number of categories of jobs and we do not want, as a public institution, we really don't want any job seeker who is qualified to miss an opportunity for a job as a laboratory technician because he or she failed to read seven pages of ads. We want to maximize our opportunities to select the best qualified candidate from a number of candidates.

* * * * *

Q. If what we are seeking to accomplish is to get the maximum return on job applicants, would the same result be accomplished easier if the job classifications were placed in some order, alphabetical order?

A. I am not sure, but I do think if it were done that way, some of my clientele would be a little happier with me and could turn their harassment over to some other issue other than advertisement. I think it would be preferable for the society in which we live today to eliminate the classification system, which is really anachronistic, I think its [sic] offensive to a male nurse to have to look in the female section to have to find his next job.

om Mr. Deck's testimony, it appears that what the ess is concerned about is not the freedom of the press

or due process. Its major concern appears to be the possible loss of revenue which would result should the newspaper be forced to abolish its present column headings. The classified layout system devised by the newspaper is obviously and intentionally a commercial aspect of the paper's function, not within the umbrella of protection afforded by the First Amendment.

### C. Case Law Supports the View that Freedom of the Press Is Not Injured by Regulation of Classified Advertising To Prevent Prohibited Discrimination.

While few court challenges to regulation of classified advertising to prevent discrimination have reached appellate level, in at least one case a Court of Appeals has gone far beyond the relief requested in the present case. In *United States v. Hunter*, 459 F.2d 205 (4th Cir.), *cert. den.* ___ U.S. ___, 93 S.Ct. 235 (1972), the Fourth Circuit Court of Appeals held that Section 3604(c) of Title VIII (Fair Housing) of the Civil Rights Act of 1968, making it unlawful to print any advertisement that indicates a preference based on race, neither infringed upon a newspaper's First Amendment freedom nor adversely affected the valid dissemination of opinion or information.[13] As the Court there stated:

> Contrary to the contentions in Hunter's brief, nothing in the statute or the relief requested by the Attorney General prohibits a newspaper from publishing news accounts concerning racial discrimination in housing, or criticizing the Government's enforcement of the Fair Housing Title, or editorially

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[13] One of the advertisements involved in *Hunter* read:

FOR RENT – Furnished basement apartment. In private white home. Call JO 3-5493.

> advocating repeal of the Act. [Citations omitted] Only publication of advertisements which indicate a discriminatory preference for certain customers in seeking a buyer or a renter of a dwelling—a commercial transaction—is proscribed. 459 F.2d at note 9.

In finding a duty on the part of the newspapers to screen ads before publishing them, the court stated that:

> a newspaper publisher can easily distinguish between permissible and impermissible advertisements in discharging his duty to reject those that violate [the law] . . . . [A] publisher can readily determine from the face of an advertisement whether it is intended to express a discriminatory preference. 459 F.2d at 212, note 9.

While the Court in *Hunter* found no violation of First Amendment freedoms in requiring newspapers to screen advertisements prior to printing, the issue in the present case is only whether a newspaper's First Amendment freedom is infringed by requiring it to abolish sex-segregated column headings. A federal District Court addressed this question directly last year: In *Greenfield v. Field Enterprises,* ___ F. Supp. ___, 4 FEP Cases 548 (N.D. Ill. 1972), an action brought under Title VII of the Civil Rights Act of 1964,[14] the court addressed itself to the defendant's argument that governmental regulation of newspaper employment advertisements constitutes a prior restraint on the press:

> The defendant sees the relief sought in this case . . . as a most invidious encroachment upon cherished American rights. This alarm is without

[14] In *Greenfield,* the Court, finding that a newspaper was not an employment agency under Title VII, granted the defendant newspaper's motion to dismiss.

basis. In addition to being the conduits for the American public, newspapers are businesses. In their commercial aspect, they enjoy no special first amendment privileges. If their practices in the commercial business of publishing classified advertisements for compensation violate the Civil Rights Act of 1964 . . . the first amendment does not shield them from the consequences of this activity. 4 FEP Cases at 550.

Even if commercial job advertisements as found in the Press' classified section, are deemed entitled to constitutional protection, such right to protection is not absolute. In *Branzburg v. Hayes*, ___ U.S. ___, 92 S.Ct. 2646 (1972), in determining the permissible regulation of the press, this Court used as its criteria a balancing of equities: the individual and social interest in freedom of expression was weighed against the social interest to be furthered by regulation. In the case now before the Court, the equities to be balanced are a possible indirect burden on a newspaper's First Amendment rights compared to an adverse impact on an individual's fundamental right to work.[15]

Sex-segregated employment advertisements inherently discriminate against all women striving to acquire jobs or to upgrade their employment status. The discriminatory effects of sexually separated help-wanted classifieds are no longer in the realm of speculative harm.[16] It is,

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[15] *Truax v. Raich*, 239 U.S. 33, 41 (1915).

[16] The President's Task Force on Women's Rights and Responsibilities confirms the fact that "sex bias takes a greater economic toll than racial bias." The median earnings of white men is $7,396; of Negro men, $4,777; of white women, $4,279; of Negro women, $3,194. Thus, sex-based discrimination, a difference in treatment without a rational basis, means dollars denied to women workers who have been deterred or barred from male job opportunities,

therefore, not an abridgement of freedom of the press to require the Pittsburgh Press to eliminate its discriminatory headings. The Press will be able to continue to exercise its editorial powers of comment and dissemination of ideas. No newspaper contends that freedom of the press would be eroded or abridged by prohibiting the

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dollars saved by employers who can hire women for the lower-paying jobs. Almost 30% of all year-round, full-time women workers earn less than $3,000 per year. (A-98). The upper limits of opportunity and mobility for working women are so structured that less than 7% of the women in this country earn salaries of $10,000 per year or more. Women are not only denied equal access to jobs, but under the policies established by the Press, they are discouraged from applying for certain work. The Press' add placement practice tends to prevent women even from being sufficiently notified of job opportunities.

The economic plight of the American working woman has been well documented and its severity has been established with certainty. For a majority of women in the 1970's, the need to work is not a simple decision of the idle and bored, but a choice fostered by compelling economic necessity. A majority of these women do not have the option of working solely for personal pleasure. Nearly two-thirds of all adults living in poverty are women. More than 31.5 million women are working today; by 1980 this figure is expected to reach 37 million and the proportion of women to the total work force ranges from a low of 34% in Pittsburgh to a high of 42% in Washington, D.C.

Thousands upon thousands of American family units are no longer headed by the traditional male wage earner. For these working women—mothers, widows, divorcees, the aged, disadvantaged young—employment and the wages they earn are of imperative concern to them and their dependents. These women workers, regardless of their ability, training or aspirations, are being forced into a lower economic level of very limited circumfrence. The lowest level is poverty, and the reliance on the welfare system. A very high percentage of women who are employed full-time exist at this level.

*See Report of the President's Task Force on Women's Rights and Responsibilities, A Matter of Simple Justice,* April, 1970, at 18

use of captions such as "Jobs–Black Interest," "Jobs–Jewish Interest," or "Jobs–Irish Interest." (A-391a). Equality of the sexes before the law is also an "idea whose time has come."[17]

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and at 54, n. 52; Richard D. Lyons, "Pay Gap Widens Between the Sexes," New York Times December 28, 1972 at 34, col. 1; Women's Bureau, Wage and Labor Standards Administration, U.S. Department of Labor, "Why Women Work" (rev. ed. 1971) (WB-3092); "Women's Labor Ranks Grow, But Salary Gap with Men Widens." *Fair Employment Report*, March 30, 1970 at 41; Women's Bureau, Workplace Standards, U.S. Department of Labor, "Who are the Working Mothers?" (1970) (Leaflet 37); Women's Bureau, Wage and Labor Standards Administration, U.S. Department of Labor, "Women Workers in Regional Areas and In Large States and Metropolitan Areas," (1971); Women's Bureau, Wage and Labor Standards Administration, U.S. Department of Labor, "Fact Sheet on the American Family in Poverty," (rev. ed. 1971).

[17] *In Morrow v. Mississippi Publishers*, 5 FEP Cases 287 (S.D. Miss. 1972), another court was faced with the issue of whether or not it was legally permissible for a newspaper to publish sex-segregated employment advertisements under Title VII of the Civil Rights Act of 1964. In denying the defendant's motion for summary judgment, the court stated:

> Pending trial on the merits, this Court adopts the concluding language of the court in the *Greenfield* case, *supra*: "It seems appropriate to suggest, however, to the defendant, however gratuitously, that the position of the plaintiffs is an idea whose time has come and that serious consideration be given to revision of the classification practices in employment advertising without reference to and free from the compulsion of the jurisdiction of the Court." 5 FEP Cases at 289.

## II.

## THE PITTSBURGH PRESS AIDS AND PARTICIPATES IN DISCRIMINATION AGAINST WOMEN IN VIOLATION OF ORDINANCE NO. 75.

An examination of the text of Pittsburgh's Ordinance and of the testimony before the Human Relations Commission establish that the newspaper's selection of column headings must comply with the ordinance and that no issue of due process is here involved.

### A. Due Process Is Not at Issue in This Case.

The Pittsburgh Press has nowhere specifically stated the constitutional basis of its due process argument. For purposes of further discussion *Amicus* assumes, as apparently did the Courts of Pennsylvania, that the Press is alleging a violation of the Fourteenth Amendment to the United States Constitution. The due process argument presented by the Press is based apparently on the claim that before a newspaper can be found to be in violation of the ordinance, proof is required that an advertiser in fact refused to employ a female job applicant under discriminatory circumstances. The American Newspaper Publishers' Association claims further that the failure to allege and prove the occurrence of a specific act of discrimination on the part of one of the employers who advertised in the Press was fatal to the sufficiency of the complaint and, therefore, constituted a denial of due process.

Although the Pittsburgh Press alleges a question of due process is in issue, the newspaper appears instead to be attacking the correctness of the Commission's judgment. Review of such a challenge must turn on a weighing of the evidence. The Commission, having heard all witnesses'

testimony, was in the best position to determine the evidence. Absent a showing of abuse of discretion on the part of the Commission, its decision should not be reversed.

In a state railway commission decision, a due process issue was raised in a similar manner. In *Railroad Commission v. Pacific Gas and Electric Company*, 302 U.S. 388 (1938), this Court found no violation of due process, stating:

> . . . There must be due notice and an opportunity to be heard, the procedure must be consistent with the essentials of a fair trial, and the Commission must act upon evidence and not arbitrarily.
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> * * * * *
>
> . . . When the rate-making agency of the state gives a fair hearing, receives and considers the competent evidence that is offered, affords opportunity through evidence and argument to challenge the result, and makes its determination upon evidence and not arbitrarily, the requirements of procedural due process are met. 302 U.S. at 393-394.

The Pittsburgh Press does not deny the right of a municipality to enact appropriate legislation for the regulation of discriminatory practices, nor does the Press now claim that it was denied a full and fair hearing with respect to whether any of its actions violated provisions of the Pittsburgh Ordinance. (A-385a, 386a). Indeed, the Press does not claim that any specific aspect of due process was denied it nor did the Commonwealth Court of Pennsylvania find any abuse of discretion on the part of the Pittsburgh Human Relations Commission:

> In its "Decision and Order" the Commission made ten findings of fact which, upon our review of the

record are supported by substantial evidence . . . (A-382a).

### B. Principles of Criminal Law Are Not Applicable to the Present Case.

The Pittsburgh Press argues that those principles relating to criminal conspiracy proceedings requiring an act by a principal before an "aider and abettor" can be charged, should apply to this case. There is no evidence of intent on the part of the Pittsburgh City Council to apply such a definition to the terms "aid, incite, compel, coerce or participate".[18] In fact, the term "abettor" is not found anywhere in the language of the Ordinance; actions brought under this ordinance are civil in nature, and the remedies available are civil in concept.

The Pittsburgh Ordinance does not grant the Commission any powers of a criminal nature. The Commission

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[18] Section 296(6) of the New York Human Rights Law states:

> It shall be an unlawful discriminatory practice for any person to aid, *abet*, incite, compel or coerce the doing of any acts forbidden under this article or attempt to do so. (Emphasis added.)

This statute has been interpreted by the Supreme Court, Erie County, to permit application of judicial principles of criminal liability, *NOW v. Buffalo Courier-Express*, 5 FEP Cases 95 (N.Y. S.Ct., Erie County 1972); however, the Appellate Division of the New York Supreme Court has also interpreted this same section pointing to a distinction between the New York statutory scheme and the Pittsburgh Ordinance. *NOW v. State Division of Human Rights*, 5 FEP Cases 323 (N.Y.S.Ct. Appellate Division, 1972). The New York Appellate Division strongly suggested that had the New York statute been identical in all respects to Pittsburgh's ordinance, the New York Court would have found a newspaper publishing sex-segregated help wanted advertisements to be in violation of the statute.

has authority to find that an individual in fact committed an unlawful employment practice in violation of the ordinance. It can also grant certain orders including cease and desist orders, reinstatement, and back pay. (A-430a). The Commission itself has no authority to secure enforcement. Only in the event that an individual commits a further act, the actual violation of an order of the Commission, may the Commission certify the case to the City Solicitor for further proceedings. (A-431a). The Commonwealth Court stated:

> This is not a matter of whether the Pittsburgh Press *intentionally conspired* with some employer or employers to discriminate against women. What is of importance is that through the use of its arbitrarily selected column headings the Pittsburgh Press "aids" such employers to discriminate. When the Pittsburgh Press arbitrarily arranges and publishes such column headings it is aiding in sex discrimination. (Emphasis added) (A-392a).

**C. Maintaining Separate Sex-Segregated Help-Wanted Columns Constitutes an Unfair Employment Practice Within the Meaning of the Pittsburgh Ordinance.**

The Press claims that a newspaper cannot be found to be in violation of the Human Relations Ordinance unless an employer who advertised in the Press is first found to have actually discriminated against a female. An analysis of Pittsburgh City Ordinance No. 75 indicates that newspaper publishers are covered by its provisions separate and apart from any showing of a discriminatory act on the part of another.

The classified advertising procedures of the Press are established by the newspaper rather than by its advertisers or its public. The Press by maintaining separate column headings and actively participating in the advertiser's "proper" choice of columns is acting unlawfully and in violation of Human Relations Ordinance No. 75, as amended by Ordinance No. 395. The Ordinance, one of broad purposes, is described as being:

> AN ORDINANCE–prohibiting discrimination in employment . . . in the social, cultural and economic life of the City of Pittsburgh; requiring fair employment practices . . . by prohibiting discrimination in employment . . . because of . . . sex.

The scope of the Ordinance is set forth in Section 3:

> This Ordinance applies to discriminatory practices, including but not limited to discrimination in employment, housing and public accommodations, which occur within the territorial limits of the City of Pittsburgh and to employment, contracted for, performed or to be performed within these limits, and to housing accommodations and places of

public accommodation, resort, recreation and amusement located within the territorial limits of the City.

Section 8 of the Ordinance enumerates various employment practices deemed to be unlawful,[19] while

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[19] Section 8 of the Pittsburgh Human Rights Ordinance reads as follows:

SECTION 8. UNLAWFUL EMPLOYMENT PRACTICES

It shall be an unlawful employment practice, except where based upon applicable national security regulations established by the United States, by the Commonwealth of Pennsylvania, or by any political subdivision of the Commonwealth having jurisdiction in the City of Pittsburgh, or except where based upon a bona fide occupational exemption certified by the Commission in accordance with Section 7, subsection (d) of this ordinance:

(a) For any employer to refuse to hire any person or otherwise to discriminate against any person with respect to hiring, tenure, compensation, promotion, discharge or any other terms, conditions or privileges directly or indirectly related to employment because of race, color, religion, ancestry, national origin or place of birth.

(b) For any employer, employment agency or labor organization to establish, announce or follow a policy of denying or limiting, through a quota system or otherwise, the employment or membership opportunities of any person or group of persons because of race, color, religion, ancestry, national origin or place of birth.

(c) For any employer, labor organization, employment agency or any joint labor-management committee controlling apprentice training programs to deny to or withhold from any person the right to be admitted to or participate in a guidance program, an apprenticeship training program, an on-the-job training program or any other occupational training program because of race, color, religion, ancestry, national origin or place of birth.

(d) For any employer, employment agency or labor organization to require of any applicant for employment or membership any information concerning race, color, religion, ancestry, national origin or place of birth.

subsection (e) of that section makes it an unlawful employment practice for:

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(e) For any employer, employment agency or labor organization to publish or circulate, or to cause to be published or circulated, any notice or advertisement relating to employment or membership which indicates any discrimination because of race, color, religion, ancestry, national origin or place of birth.

(f) For any employment agency to fail or refuse to classify properly or refer to employment or otherwise to discriminate against any person because of race, color, religion, ancestry, national origin or place of birth.

(g) For any employer substantially to confine or limit recruitment or hiring of employees, with intent to circumvent the spirit and purpose of this ordinance, to any employment agency, employment service, labor organization, training school, training center or any other employee-referring source which serves persons who are predominantly of the same race, color, religion, ancestry, national origin or place of birth.

(h) For any labor organization to discriminate against any person in any way which would deprive or limit his employment opportunities or otherwise adversely affect his status as an applicant for employment or as an employee with regard to tenure, compensation, promotion, discharge or any other terms, conditions or privileges directly or indirectly related to employment because of race, color, religion, ancestry, national origin or place of birth.

(i) For any employer, employment agency or labor organization to discriminate against any person because he has opposed any practice forbidden by his ordinance or because he has made a complaint or testified or assisted in any manner in any investigation or proceeding under his ordinance.

(j) For any person, whether or not an employer, employment agency or labor organization, to aid, incite, compel, coerce or participate in the doing of any act declared to be an unlawful employment practice by this ordinance, or to obstruct or prevent any person from enforcing or complying with the provisions of this ordinance or any rule, regulation or order of the Commission, or to attempt directly or indirectly to commit any act declared by this ordinance to be an unlawful employment practice.

> any employer . . . to publish or cause to be published or circulated any notice or advertisement relating to employment . . . which indicates any discrimination [because of sex].

Subsection (j) of Section 8 in turn makes it a violation for "any person to aid, incite, compel, coerce or participate" in the doing of *any* of the acts enumerated in Section 8, Subsections (a) through (i).

*Amicus* contends it is sufficient to establish that a newspaper itself committed an unfair employment practice in order to bring it within the confines of the ordinance. The Press, by making sex-segregated help-wanted columns available to employers and publishing job advertisements in those columns is committing an unfair employment practice within the meaning and intent of the ordinance. The very most that can be required of a complaint under Section 8(j) of the Pittsburgh Ordinance is to show generally that the actions of employers placing job opportunity advertisements in the Press were discriminatory under Section 8(a) through (i) of the ordinance.

Nowhere in the ordinance do the sections relevant to aiding and participating indicate that the only unlawful practices are those in aid of an employer, a labor organization or employment agency. The absence of such a relationship is noteworthy. The ordinance states numerous times that it shall be unlawful for any person to aid or participate in the *doing* of an unlawful practice. Section 8(j) does not make an otherwise unfair employment practice unlawful only if assisting someone else in the doing of an unfair labor practice.

This interpretive view is substantiated by Section 11 of the ordinance, which provides that:

It shall be unlawful for any person, *whether or not* within the named classifications set forth in the ordinance, to aid, incite, compel, coerce or participate in the doing of any act declared to be an unlawful practice under this ordinance, or to obstruct or prevent enforcement or compliance with the provisions of this ordinance or any rule, regulation or order of the Commission or to attempt directly or indirectly to commit any act declared by this ordinance to be an unlawful practice. (Emphasis added)

The Press aided in the discriminatory practices of employers by encouraging advertisers to select a column preference and even in some instances by making the discriminatory choice itself, in a situation where, admittedly, no advertisers had ever been granted a bona fide occupational exemption by the City of Pittsburgh pursuant to Section 7(d) of the ordinance.[20] The procedure of the Press actually appears to have been designed to encourage advertisers to select either the "male interest" or "female interest" column rather than in the "neuter" male-female column.

The following excerpts of the testimony of Robert Seli, Classified Advertising Manager of the Pittsburgh Press, before the Commission describe the ad placement procedures of the Pittsburgh Press (A-126).

A. . . . Most of the people who call in have a preference. . . . They know where they want the ad to run . . . male or female interest. They express this interest where they would like to have this ad placed. In what category. At times,

[20] Decision and order of the Pittsburgh Commission on Human Relations, July 23, 1970 set out in Appendix to Petition for a Writ of Certiorari at 1a, 13a.

when they do not express a preference, we ask them where they would prefer to have it placed.

Q. When no preference is expressed by advertisers, you then solicit from the advertiser a response to whether he has a preference?

A. Yes, where they would prefer to have it placed.

(A-172a, 173a).

Q. . . . Supposing [customer] says, I leave it up to you.

A. . . . We explain to him where most of these jobs run—where the interest runs. This is where the male interest runs; this is where the female interest runs. These are the number of jobs in here. And they know the advertisers know, where they get the best results. I think Mr. Deck in his testimony before stated this. That they get better results when they run it in the separate classification. It's of more interest to the man or it's of more interest to the women.

Q. . . . Do you then proceed to tell them of the several categories that should go under this or that, take your choice?

A. We tell them where the majority is—or we try to find out what type of person they are looking for. *Are they looking for a man, or are they looking for a woman? They know this. And they are interested or more interested in a man or interested in a woman. They know this, and they state this.* This is where they want it. (Emphasis added)

There is no doubt that the actions of the Pittsburgh Press as testified to before the Commission are discriminatory toward women. The Common Pleas Court of Pennsylvania stated:

> The evidence establishes that the Press requests that its advertisers indicate a preference as to where any employment ad is placed. There was no evidence offered to show that the preference of the advertisers is based in any way upon any specific bona fide occupational qualifications as certified by the Commission or based upon any exemption or exception to the operation of the terms of the Ordinance. Nor is there evidence that the Press questions its advertisers about any exceptions when it requires that a preference be designated. (Appendix to Petitioner's Brief at 32a).

The Court then found:

> There is evidence that the classification system used by the Press discourages women from application for jobs classified for male interest. (A-33a).

The Commonwealth Court found substantial evidence to support the conclusion that:

> . . . in its employment advertising the Pittsburgh Press was aiding employers in discriminating against women through the use of the above-noted column headings and therefore was engaged in an unlawful employment practice violative of Section 8(j) of the Ordinance. (A-382a).

The basis for the help-wanted classified advertising procedures of the Press as expressed in Petitioner's Brief is that:

> . . . the Press believes that the employment patterns in this country generally reflect job interest and qualification along sex lines. . . .
>
> . . . Most secretaries and nurses are women and most laborers and managers are men, and, therefore it is not unreasonable to believe that most qualified applicants for a job advertisement will be attracted

from the men or women presently filling such positions. (Petitioner's Brief at 26).

In direct opposition to the Press' view of job-related interests is a statement of the U.S. Department of Labor:

> Jobs, with extremely rare exceptions, are sexless. Women are found in all of the 479 occupations listed in the 1960 decennial census. Tradition rather than job content has led to labeling certain jobs as women's and others as men's. For example, although few women work as engineers, studies show that two-thirds as many girls as boys have an aptitude for this kind of work. U.S. Dept. of Labor, Employment Administration, Women's Bureau, April, 1971, *The Myth and the Reality*, 2.

Even if the Court were to find that Section 8(j) required proof that an employer engaged in a discriminatory practice before Section 8(i) or Section 11 became operative as a viable restriction on discriminatory practices, the activities of the Press are within the jurisdiction of the Commission. The fact that employers listed job opportunities under sex-segregated columns in the Press without a bona fide occupational exemption certificate (*see supra*, n. 20, p. 24) establishes a *prima facie* violation of the Ordinance (*see* Section 8(e)) and the maintenance by the Pittsburgh Press of separate male and female columns rather than a separate column clearly designated for advertisers holding bona fide occupational exemption certificates is proof of the newspaper's participation and help in this practice. No further showing of a violation should be required.

The Pennsylvania Commonwealth Court of Appeals in this case stated:

> It is no longer possible to state that all women desire or have a "interest" in, any one type of classifica-

tion of work. Some women have the desire, ability and stamina to do any work than [sic] men can do. Once we accept such a premise it then becomes logically impossible to permit continued segregation of employment want-ads by column headings for any job coming within the purview of the ordinance. (A-390-391a).

Continuing, the Court said:

> The right to work and its concomitant opportunity to achieve economic security and stability are essential to the pursuit of life, liberty and happiness. As early as 1915, the United States Supreme Court declared that:
>
> "... The right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment [Fourteenth] to secure. *Truax v. Raich*, 239 U.S. 33, 41, 60 L.Ed. 131, 135 (1915)." (A-59a).

The Pittsburgh Press in its brief (Petitioner's Brief p. 25) attempts to justify its discriminatory practices in two ways. Each is equally lacking in logic and support. The Press alleges that it has a special right to do what others under the law cannot, merely because it is a newspaper and because it *believes* that certain types of jobs are "typically" those in which male workers have an interest while other types of jobs are "women's work." The Press also justifies its position by stating that readers prefer the help wanted columns to be segregated and that such a practice assures maximum reader exposure and response to employment advertisements. This statement is a contradiction in terms since almost half of the available work force is not invited to read either of the sex segregated columns and any ad therefore may not be

read by many seeking jobs. Testimony established that a female would usually be discouraged from applying for a job under a "male interest" column. (A-80a). The newspaper's desire for maximum exposure and responses to ads could best be obtained with a single help-wanted column available to all, regardless of a presumed and unproven sex-based interest in employment. In addition, testimony established only that advertisers and newspapers prefer segregated columns, not that newspaper readers do. (A-172a, 173a). Assuming *arguendo* that such preferences do exist, no automatic assumption of legality would necessarily follow. In *Diaz v. Pan American Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971) the Court, speaking to the principle of customer preference in a sex discrimination case arising under Title VII of the Civil Rights Act, stated:

> While we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome. Thus we feel that customer preference may be taken into account only when it is based on the company's inability to perform the primary function or service it offers. 442 F.2d at 389.

A comparison of the evidence reveals that the jobs offered under "male-interest", and "female-interest" headings are disparate in terms of the calibre of jobs and the salaries offered for seemingly comparable areas of work. Documentation of this discovery shows that low status and low paying jobs are predominantly under the "female-interest" captions; that the high-status and high-

pay jobs appear under the "male-interest" headings.[21] (A-343-353a, 355a).

Testimony of Ruth Anderson, one of the witnesses before the Commission, reveals that she responded to a "male only" dishwasher ad and was immediately refused the position because of her sex. (A-262-265a). The Commonwealth Court of Pennsylvania took note of this testimony in its opinion:

> In view of the fact that the discriminatory practice came about as a result of an ad placed by the employer and was published in a arbitrary segregated "male" column, we hold that there was substantial evidence placed in the record to support the charge made by N.O.W. (Opinion, A-389a).

The policy of the Press apparently is based on a stereotypical view of times long past. The newspaper completely ignores the intent of the Pittsburgh Human Relations Ordinance, as well as state and federal law, against discrimination on account of sex. The Press appears to be making an argument on behalf of the *status quo* and the backseat position of women in today's job market. *Amicus* believes that the Pennsylvania Commonwealth Court has succinctly and correctly summarized the proper conclusion to this case in its statement that:

> We agree with counsel for the Pittsburgh Press when he states, "The purpose of the statute was to prohibit practices which denied job opportunities to

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[21] Exhibit No. 1 at page 327a of the Appendix shows that the average salary for job opportunities listed under the "male interest" column in the January 4, 1970, classified ad section of the Pittsburgh Press was $16,000.00; whereas, the average salary for positions listed under the "female interest" column was $8,500.00 and the average salary for jobs under the "male-female" help wanted column was $12,000.00.

individuals because of sex." The Pittsburgh Press cannot frustrate that purpose by a declaration that column headings are arranged for a reader's convenience and that any recourse to be had by women lies against those employers who do in fact discriminate. (A-59).

Both the Pittsburgh Press and its *Amicus*, ANPA, claim that unless this case is reversed, newspapers will be required to

> . . . screen advertising at their peril and in that screening process to make instantaneous judgments on the discriminatory impact of thousands of employment ads daily, the ordinance as interpreted places an unconstitutional burden on the Press. (*Amicus* Brief, p. 19).

Ordinance No. 75 provides a clear, simple procedure for certifying bona fide occupational exemptions. (A-Opinion, 380a). Indeed, no onerous burden is placed on the newspaper. The Pittsburgh Press, in compliance with federal policies apparently already screens its ads for racial content (A-162a). Under the Pittsburgh Ordinance, the newspaper now need only go the last half-mile toward equality by providing a column heading for positions for which bona fide occupational exemption certificates have been obtained and a single column for all other help-wanted advertisers.

## CONCLUSION

For the reasons stated above, the decision of the Supreme Court of Pennsylvania should be affirmed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

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No. 72-419

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PITTSBURGH PRESS COMPANY,

*Petitioner*

v.

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS AND THE CITY OF PITTSBURGH AND THE NATIONAL ORGANIZATION FOR WOMEN, INC.,

*Respondents*

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## AMICUS CURIAE BRIEF IN SUPPORT OF AFFIRMANCE

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### LOWER COURT OPINIONS

The opinion of the Pittsburgh Human Relations Commission is unreported. The opinion of the Court of Common Pleas of Allegheny County is unofficially reported in 3 EPD ¶ 8154 (CCH Publication, "Employment Practice Decisions", cited hereinafter as EPD).

The opinion of the Commonwealth Court of Pennsylvania is reported at 4 Commonwealth Court 448, 287 A.2d 161 (1972).

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1). The Pennsylvania Supreme Court denied review on June 21, 1972. Certiorari was granted by this court on December 4, 1972. —— U.S. ——, 93 S. Ct. 515 (1972).

## QUESTION PRESENTED

Does an ordinance which has the effect of prohibiting the printing of sex discriminatory help-wanted advertisements by a newspaper violate freedom of the press?

## AMICUS CURIAE AUTHORITY

The International Association of Official Human Rights Agencies files a brief *amicus curiae* in these proceedings pursuant to Rule 42(2) of the Rules of the Supreme Court of the United States. The Association has obtained the consent of respondents but has not obtained the consent of petitioner to file a brief *amicus curiae*.

## INTEREST OF AMICUS CURIAE

The International Association of Official Human Rights Agencies (IAOHRA) is an umbrella organization consisting of state and local civil rights agencies throughout the country. Included in IAOHRA's active membership are the following contributing agencies: State of Alaska Commission for Human Rights, Connecticut Commission on Human Rights and Opportunities, Iowa Civil Rights Commission, Kentucky Commission on Human Rights, Massachusetts Commission Against Discrimination, Michigan Commission on Civil Rights, State of Maryland Commission on Human Relations, and the State of Nebraska Equal Opportunity Commission. All of the foregoing agen-

cies are charged with protecting and advancing the cause of human rights including enforcement responsibilities for state civil rights laws dealing with such matters as employment, housing and public accommodations. These agencies are similar in function, if not identical, to the Pittsburgh Commission on Human Relations. The issues raised in these proceedings involve whether or not a newspaper may encourage constitutionally and statutorily forbidden discrimination. Also, significant questions are raised as to the extent to which states and localities may attempt to end discrimination by attacking not only those who discriminate but those who make discrimination possible. Reversal of the decision below could result in advertising which promotes sex and race distinctions affecting the enforcement responsibilities of state and local civil rights agencies.

## STATUTES INVOLVED

Pittsburgh Human Relations Ordinance No. 75 (1967) as amended by Ordinance No. 395 (1969) which provides *inter alia*

Section 8

* * *

It shall be an unlawful employment practice . . . except where based upon a bona fide occupational exemption certified by the Commission in accordance with Section 7, subsection (d) of this ordinance: . . .

(j) for any person, whether or not an employer, employment agency or labor organization, to aid, incite, compel, coerce or participate in the doing of any act declared to be an unlawful employment practice by this ordinance, or to obstruct or prevent any person from enforcing or complying with the provisions of this ordinance, or any rule, reg-

ulation or order of the Commission, or to attempt directly or indirectly to commit any act declared by this ordinance to be an unlawful employment practice.

## STATEMENT

This Amicus adopts the statement set forth in the brief of Petitioner.

## ARGUMENT

### Regulation of Those Who Aid Employment Discrimination on the Basis of Sex Is Constitutionally Permissible.

Arbitrary classification of the sexes has been declared unconstitutional by this court and is prohibited by statute.

The language of *Reed* v. *Reed*, 404 U.S. 71 (1971), is clear:

> To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context *may not lawfully be mandated solely on the basis of sex*. *Id.* at 77 [Emphasis supplied].

This constitutional mandate runs to both sexes. To require a male to cut his hair for reasons of sanitation, safety or uniformity, and then to fail to apply that regulation to females imposes unreasonable and oppressive standards on males. *Griffin* v. *Tatum*, 425 F.2d 201 (5th Cir. 1970).

In the employment field, discrimination based on sex is subject to further limitations by statute.

Title VII of the *Civil Rights Act of 1964*, 42 U.S.C. 2000e (1970), as interpreted in the Equal Employment Opportunity Commission Guidelines on Sex Discrimination, has declared that sex discrimination in the employment recruitment field is unlawful.

The purpose of the inclusion of the prohibition against sex discrimination in the Act is not only to achieve the optimum use of our labor force, but to enable individuals to be judged independent of their sex. *Diaz* v. *Pan American World Airways*, 442 F.2d 385 (5th Cir. 1971), *Sub nom* 404 U.S. 950 (1971).

Sex discrimination becomes manifest when a whole class is relegated to an inferior status when it is denied privileges or deprived of opportunities without regard to the characteristics or capabilities of its individual members. The mandate of the courts is to eliminate the use of outdated stereotyped classifications by employers. *Sail'er Inn, Inc.* v. *Kirby*, 95 Cal. Rptr. 329, 485 P.2d 529 (1971).

Petitioner incorrectly argues that employment patterns in this country generally reflect job interest and qualifications along sex lines but not along racial or nationality lines. Employment patterns clearly manifest that females are concentrated in lower paying jobs and if not virtually excluded are grossly underrepresented in sales, professional, and managerial positions in comparison to white males. The Senate Labor and Public Welfare Committee has found that

> . . . while Title VII has been on the statute books for over 5 years, its proscription of sex discrimination continues to be widely regarded as a kind of legislative accident. . . . [*W*]*omen's rights are not a laughing matter* . . . [T]he administration and . . . [Civil Rights Agencies are urged] to util-

> ize the enforcement mechanisms and expanded coverage of this bill to dispel any lingering doubts that the federal government is aware of, and fully responsive to, the need to end sex discrimination with the same dedication expected in ending discrimination because of race, color, religion or national origin. S. Rep. No. 91-1131, 91st Cong., 2d Sess., pp. 5-6 (1970). [Emphasis supplied]

It is clear that Congress intended to prevent employers from refusing "to hire an individual based on stereotyped characterizations of the sexes." Equal Employment Opportunity Commission Guidelines on Discrimination Because of Sex, 29 CFR Section 1604.1(a)(1)(iii). See *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969); *Weeks* v. *Southern Bell Telephone and Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969). Whether a woman cabin attendant is married, *Spregis* v. *United Air Lines*, 444 F.2d 1194 (7th Cir. 1971) *cert. den.* 404 U.S. 999 (1971), or a woman factory employee has pre-school age children, *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971), or whether a cabin attendant is male or female, *Diaz* v. *Pan American World Airways, supra,* is irrelevant to the jobs in question because there is no demonstrated correlation between job performance and the sex of the applicant or employee.

Thus, when the Pittsburgh Commission on Human Relations found under the City Fair Employment Practices Law that more attractive employment opportunities consistently appeared in the male classification, this laid a basis upon which the Commission could find a discriminatory recruiting practice which was aided and promoted by the Petitioner. Of course that administrative interpretation by any agency enforcing a civil rights law as well as the Pennsylvania Commission's guidelines on sex discrimination noted by the lower

court are entitled great weight. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Trafficante* v. *Metropolitan Life Insurance Co.*, —— U.S. ——, 41 U.S.L.W. 4071 (1972); *Udall* v. *Tallman*, 380 U.S. 1 (1970); *Phillips* v. *Martin Marietta Corp., supra.*

In *Griggs* v. *Duke Power Co.*, 404 U.S. 424 (1971), this Court held a showing of business necessity may relieve an employer of strict compliance with equal employment opportunity obligations. The business necessity test has been narrowly construed in *Diaz* v. *Pan American World Airways, supra.* Necessity connotes an irresistible demand. *U.S.* v. *Bethlehem Steel Corp.*, 444 F.2d 652 (2nd Cir. 1971). Even economic hardship is not sufficient business necessity to justify the discriminatory employment practice. *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971).

The Federal, State, and local Fair Employment Practices Laws all contain a bona fide occupational qualification (BFOQ) exception for sex, religion or national origin which also may relieve an employer of strict compliance with equal employment opportunity laws. However, the BFOQ exception has been given a limited construction by the federal courts to prevent the exception from emasculating the general rule prohibiting discrimination in employment on account of sex. *Ridinger* v. *General Motors Corp.*, 325 F. Supp. 1089 (S.D. Ohio 1971); *Phillips* v. *Martin Marietta Corp., supra.* The only exception is the situation where unique physical attributes of one sex or the other are essential to the performance of the job in question, *Rosenfeld* v. *Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971). It is clear from the Commission's Order and the lower court decision that Petitioner will suffer no liability under the BFOQ exception and the evi-

dence of record shows no relationship to the exception. Therefore, the exception has no applicability to the instant case.

At the same time customer preference has been held not to be sufficient justification to validate otherwise unlawful employment practices. *Doe* v. *Osteopathic Hospital of Wichita, Inc.*, 333 F. Supp. 1357 (D. Kan. 1971); *Diaz* v. *Pan American World Airways, supra.* Despite Petitioner's argument to the contrary, customer or reader preference regarding sex is not a BFOQ and does not satisfy the test of business necessity.

By its use of disclaimer paragraphs at the beginning of the classified section, Petitioner expressly concedes that sex designated columns can lead readers to conclude that employers are expressing a sex preference by their manner of advertising an opportunity which would not exist if the newspapers did not provide separate columns. *Hailes* v. *United Air Lines,* 464 F.2d 1006 (5th Cir. 1972). The disclaimer, while attempting to mitigate the impact of the separate columns, does not eliminate the effect on the reader that employers are using the arrangement to indicate that some jobs are more suitable for one sex than another. Such disclaimer does not neutralize the sex segregated want-ad. *Hailes* v. *United Air Lines, supra.* It is just as illegal to advertise with sex designated headings as it is to do so with other headings such as religious, racial or nationality designations. *United States* v. *Hunter*, 459 F.2d 205 (4th Cir. 1972), *cert. denied* —— U.S. —— 93 S. Ct. 235 (1972).

Title VII Courts have taken a restrictive view regarding the regulations of a newspaper's conduct in

aiding and promoting sex discrimination in employment recruitment. *Brush* v. *San Francisco Newspaper Printing Co.*, 315 F. Supp. 577 (N.D. Calif. 1970), *aff'd* —— F.2d —— (9th Cir. 1972), *Cert. filed* Docket No. 72-880; *Greenfield* v. *Field Enterprises, Inc.*, —— F. Supp. —— (N.D. Ill. 1972) 4 EPD 7763; *but see, American Newspaper Publishers Assoc.* v. *Alexander*, 294 F. Supp. 1100 (D.C.D.C. 1968); *aff'd in part, vacated in part* —— F.2d —— (C.A. D.C. 1969), 1 EPD 9460; *Morrow* v. *Mississippi Publishers Corp.*, —— F. Supp. —— (S.D. Miss. 1972), 5 EPD ¶ 8415.

Regardless of the Title VII holdings, the Pittsburgh Ordinance as well as many other state and local civil rights laws have *extended* the government's ability to regulate sex discrimination to include the activities of newspapers among those who *aid and promote* discriminatory recruiting practices. The record below clearly indicates that Petitioner did aid and promote unlawful sex discrimination in violation of the local ordinance. The only remaining question is whether the Commission's Order is constitutionally permissible.

Sex designated column headings are not constitutionally protected when violative of civil rights laws. The headings are so closely related to the classified advertisements that they cannot be separated from the purely commercial nature of that advertising. In a case involving prohibition of discriminatory real estate advertising by a newspaper the fourth circuit ruled advertising for a commercial purpose is subject to regulation by the state. *United States* v. *Hunter*, 495 F.2d 205 (4th Cir. 1972), *cert. denied* —— U.S. ——, 41 U.S.L.W. 320 P. 1972). In *Hunter*, the court cited an unbroken line of authority to support the distinc-

tion between communication of ideas and purely commercial material.[1]

*Hunter* should be dispositive on the issue of First Amendment coverage. The decision upheld the validity of the *Civil Rights Act of 1968*, 42 U.S.C. § 3604(c), which prohibits newspapers from publishing discriminatory housing advertisements. The Court distinguished between the expression of ideas protected by the First Amendment and commercial advertising in a business context:

> It is now well settled that, while freedom of communicating information and disseminating opinion enjoys the fullest protection of the First Amendment, the Constitution imposes no such restraint on government as respects purely commercial advertising. Citing *Valentine* v. *Chresensen*, 316 U.S. 52, 54 (1942).

Employment and real estate advertisements are printed by newspapers as a profit-making activity. It does not require a broad reading of *Valentine* to find that the column headings are commercial in nature, not editorial. The whole purpose of column headings is to project a commercial message. The headings direct the reader to what follows.

While the sex designations reflect the opinions of the editors, they are opinions as to the way of maximizing revenue from the classified advertisements by facilitating reader response in a manner which will please

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[1] *Bread* v. *City of Alexandria*, 341 U.S. 622, 641-645 (1951); *New York State Broadcasters Ass'n, Inc.* v. *United States*, 414 F.2d 990, 998-99 (2nd Cir. 1969), *cert. denied* 396 U.S. 1061 (1970); *Banzhaf* v. *FCC*, 405 F.2d 1082, 1099-1103 (D.C. Cir. 1968) *cert. denied, sub nom.; Tobacco Institute, Inc.* v. *FCC*, 396 U.S. 842 (1969); *Capital Broadcasting Co.* v. *Mitchell*, 333 F. Supp. 582 (D.D.C. 1971).

employers. In *Valentine* the Court rejected an attempt to save a commercial handbill from proscription by printing some political material on the reverse side. The Petitioner in the instant case should not be allowed to avoid the anti-discrimination law by claiming a separation of the classified headings from the body of the advertisements. They are not functionally separable.

> Professor Emerson defines the 'commercial sector' as 'roughly' embracing the production and exchange of goods and services for profit, as distinct from the production or exchange of ideas on political, religious, artistic and similar matters. *United States* v. *Hunter, supra,* n. 6.

*New York Times* v. *Sullivan,* 376 U.S. 254 (1964) and the instant case are easily distinguishable because the classified section does not communicate ideas for a non-commercial purpose.

The Pittsburgh Ordinance does not put an undue burden on newspapers. All that is demanded of Petitioner in this case is the elimination of separate sex designated columns for employment. Thus, the protection given newspapers in *New York Times* v. *Sullivan, supra,* is not applicable to the facts of this case. There is no chilling effect on the paper's news reporting and editorial policy. The newspaper is free to have separate sports and women's sections if the editors so desire. Employers are free to place their advertisements in whatever kind of publication they choose as long as sex preferences are not indicated within the advertisement and the total effect of all recruitment techniques is not sex discrimination in hiring. As for the duty to screen employment advertising before publication, the only burden on the news-

paper is to eliminate those advertisements which on their face clearly show a discriminatory preference. In those instances where an employer claims that sex is a BFOQ the newspaper can accept in good faith a declaration from the advertiser to the validity of this claim. There is no duty put on the newspaper to investigate the actual practices or intent of employers.

Lastly, Petitioner argues a distinction between sex and the other protected classes set forth in the Pittsburgh Ordinance. This contention is utterly without support. *Reed* v. *Reed, supra.* Nothing in the Ordinance suggests such an arbitrary classification. While the policy for prohibiting sex discrimination may have been based upon different economic and social reasons than those that existed for race, religion and national origin, the Ordinance provides no variation in the rights and remedies afforded each protected class. The finding of the trial court is clear that sex is to be afforded the same protection as race and the other designations. *Appeal of Pittsburgh Press Co.*, 3 EPD 8154 at p. 6493.

If jobs can be categorized as of male or female interest there is nothing to stop newspapers from designating column headings as "Catholic Jobs" or "Italian Jobs" or from heading a real estate column "White Suburban Interest."

## CONCLUSION

As shown herein, Petitioners have no constitutional defense for conduct which aids and promotes discrimination on the basis of sex. Accordingly, for the reasons stated, the judgment below should be affirmed.

Respectfully submitted,

State of Alaska Commission on Human Relations

Connecticut Commission on Human Rights and Opportunities

Iowa Civil Rights Commission

Kentucky Commission on Human Rights

State of Maryland Commission on Human Relations

Massachusetts Commission Against Discrimination

Michigan Commission on Civil Rights

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February, 1973

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# In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-419

PITTSBURGH PRESS COMPANY, PETITIONER

*v.*

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS, ET AL.

*ON WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA*

## MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

### QUESTIONS PRESENTED

1. Whether the application to petitioner of a local ordinance making it unlawful to publish help-wanted advertisements under column headings designating a sex preference was consistent with the due process clause of the Fourteenth Amendment.

2. Whether the ordinance as construed and applied to petitioner violates the First Amendment.

### INTEREST OF THE UNITED STATES

The United States has a continuing interest in, and responsibility for, eradicating discriminatory prac-

tices which deny persons, on account of race, color, national origin, religion, or sex, an equal opportunity to enjoy the benefits of society.

National policy in the area of civil rights has long favored the assumption by state and local governments of primary responsibility for protecting the civil rights of their citizens. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, as amended by the Equal Employment Opportunity Act of 1972, P.L. 92–261, reflects this policy by requiring federal deference to state and local agencies responsible for enforcing fair employment practices until 60 days after commencement of proceedings under the state or local law.[1] Accordingly, the United States has a direct interest in the effective functioning of agencies such as the Pittburgh Commission on Human Relations that are empowered under local ordinances to combat discriminatory employment practices.

In addition, Congress, like the City of Pittsburgh, has determined that the proscription of certain types of commercial advertising in newspapers is essential to the protection of civil rights. Section 804(c) of Title VIII of the 1968 Act, 42 U.S.C. 3604(c), prohibits advertising that indicates discriminatory preferences in the sale or rental of dwellings. Thus, this

[1] 42 U.S.C. 2000e–5(b). Similarly, Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a, (public accommodations), and Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601, *et seq.*, (fair housing), require deference in some circumstances to state remedial action. See 42 U.S.C. 2000a–3 and 42 U.S.C. 3610(c).

Court's resolution of the First Amendment issues raised in this case may bear on the constitutionality of that provision of federal law.[5]

## STATEMENT

The facts are described in detail in the briefs of the parties. We summarize here the procedural history of this litigation.

On October 9, 1969, the National Organization for Women, Inc., (NOW) filed a complaint with the Pittsburgh Human Relations Commission, charging that petitioner was violating Section 8(j) of the Pittsburgh Human Relations Ordinance, as amended, by using sex segregated column headings in its classified advertisement section. After a public hearing, the Commission, on July 23, 1970, ordered the Press to cease and desist from using the sex-interest headings and to utilize a classification system of employment advertisements with no reference to sex (Pet. App. 18a).[6]

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[5] A First Amendment question similar to the one presented here is involved in *Hunter* v. *United States*, No. 72-146, certiorari denied, 409 U.S. 934. A petition for rehearing was filed in that case on December 7, 1972, and on February 7, 1973, pursuant to this Court's request for a response, the United States filed a memorandum suggesting that no action be taken on the petition until the present case is decided.

[6] To enforce this order, the Commission must certify "the case and the entire record of its proceedings to the City Solicitor, who shall invoke the aid of an appropriate court to secure enforcement or compliance with the order or to impose the penalties" of a maximum fine of $300, or in default of payment thereof up to ninety days in jail (ordinance, Sections 14 and 15, A. 431a).

Petitioner appealed the Commission's order to the Court of Common Pleas of Allegheny County, Pennsylvania, which affirmed the findings of fact, conclusions of law, and the order of the Commission (Pet. App. 45a). On further appeal, the Commonwealth Court of Pennsylvania also affirmed, two judges dissenting. It did, however, modify the Commission's order by permitting use of the headings for advertising positions exempt under the ordinance or certified as exempt by the Commission—*i.e.*, positions where sex is a bona fide occupational qualification (A. 400a). The Supreme Court of Pennsylvania denied a petition for review of this decision, but stayed the order of the Commonwealth Court pending determination of the case by this Court (Pet. App. 80a–81a).

## ARGUMENT

### INTRODUCTION AND SUMMARY

The courts below held that the petitioner violated the Pittsburgh Human Relations Ordinance No. 75, as amended (A. 410a–436a),[*] by utilizing column headings indicating sex preferences in its help-wanted advertisements. The ordinance makes it an unlawful employment practice for "any person * * * to aid * * * or participate in the doing of any act declared to be an unlawful employment practice by this ordinance" (Section 8(j), A. 422a), and "[f]or any 'employer' * * * to cause to be published or circulated any notice or advertisement relating to 'employment' * * * which

[*] The original ordinance does not refer to sex. These references were added by Ordinance Number 395 (A. 433a–436a).

indicates any discrimination because of * * * sex" (Section 8(e), A. 421a, 436a).[5]

The Commission and the courts below construed this language as making the publication of advertisements under discriminatory headings independently prohibited by the ordinance. Petitioner contends that the ordinance as so construed violates due process, since there was no finding that any advertising employer discriminated in hiring on the basis of sex.[6]

The ordinance, however, as construed by the Commission and the courts below, clearly defines the placing of discriminatory advertisements as an unlawful employment practice entirely independent of discrimination in hiring (which is covered by Section 8a of the ordinance, A. 420a). The legislative determinations that discriminatory hiring and discriminatory advertising constitute separate violations, and, in addition, that aiding or participating in either is also an independent violation, are rationally related to the goal of ending discrimination in employment practices, a matter of legitimate local concern.[7] This Court

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[5] The quotation marks apparently are designed to call attention to the ordinance definitions of these terms. It is undisputed that advertisers in the Press help-wanted columns included "employers" offering "employment" as defined in the ordinance (A. 156a–157a).

[6] The court below noted that there was in fact testimony in the record indicating such discrimination; it held that such evidence was not necessary (A. 389a). Petitioner apparently had agreed, arguing before the Commission that the testimony was irrelevant (*ibid.*).

[7] The determination that the classification used by petitioner constituted participation in discriminatory advertising, far from being irrational, is almost self-evident.

has long held that it will not overturn the legislative judgment of local authorities on Fourteenth Amendment grounds where, as here, such judgment is rationally related to a problem of local concern.

Petitioner's claim that the First Amendment prohibits application of the ordinance to its conduct also fails. The ordinance's narrowly drawn regulation of the commercial aspects of petitioner's business, which in no way affects petitioner's news reporting or editorial functions, is a permissible form of regulation by the State to protect the interest of its citizens in equal employment opportunity.

## I

### IT IS NOT A DENIAL OF DUE PROCESS OF LAW TO PROHIBIT THE ARRANGING AND PUBLICATION BY A NEWSPAPER OF HELP-WANTED ADVERTISEMENTS IN SEX-DESIGNATED COLUMNS

The Pittsburgh Commission on Human Relations and the courts below construed the Pittsburgh Human Relations Ordinance, as amended, as prohibiting both the placement by employers of discriminatory advertisements and the publication by newspapers of such advertisements (Pet. App. 16a–17a, 41a–42a; A. 388a–392a). They specifically held that petitioner's arrangement of help-wanted advertisements in categories headed "Jobs—Male Interest" and "Jobs—Female Interest" constituted discriminatory advertising prohibited by the ordinance. Petitioner's challenge to

these findings on due process grounds raises only very narrow issues for decision here.

This Court has long held that it does "not sit to weigh evidence on the due process issue in order to determine whether the regulation is sound or appropriate; nor is it our function to pass judgment on its wisdom." *Railway Express Agency* v. *New York*, 336 U.S. 106, 109. See also *Old Dearborn Co.* v. *Seagram Corp.*, 299 U.S. 183. Instead, the due process clause of the Fourteenth Amendment requires only that exertions of regulatory power "shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained." *Nebbia* v. *New York*, 291 U.S. 502, 525.

The Pittsburgh ordinance, as interpreted, easily meets this test. One of the stated purposes of the ordinance is to protect the population of the City of Pittsburgh from employment practices that have the effect of denying them job opportunities because of their sex. Section 2 of Ordinance No. 75, as amended, A. 434a–435a. To accomplish this goal, the Council of the City of Pittsburgh not only prohibited discrimination in hiring (Sec. 8a, A. 420a), but also prohibited employers, employment agencies and labor organizations from publishing employment advertisements that indicate a difference of treatment based upon sex (Sec. 8(e), A. 421a), and prohibited all persons, including newspapers, from participating in or aiding such publication (Sec. 8(j), A. 422a). Such aid or participa-

tion is itself designated an unlawful employment practice (*ibid.*).[4]

There is nothing arbitrary or irrational in the judgment that employment advertisements indicating a difference of treatment based on sex tend to deny job opportunities to persons because of their sex.[5] Such advertising, like the similar housing advertising prohibited by 42 U.S.C. 3604(c), discriminates by discouraging applicants from the unwanted group.

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[4] Petitioner, therefore, errs in asserting (Pet. Br. 25) that this case involves an application of the principle enunciated in *Tot* v. *United States*, 319 U.S. 463, that there must be a rational connection between the fact proved and the ultimate fact presumed. The ordinance prohibits persons from participating in publishing employment advertising that indicates discrimination based on sex. The court below correctly found that petitioner had so participated by its practice of arranging want ads under column headings that indicate a sexual preference on the part of employers. No evidentiary presumptions were required or used in reaching this conclusion; petitioner's conduct was unlawful because it violated the ordinance, not because the conduct proved permitted an inference that employers were discriminating in hiring. The placing of advertising under petitioner's headings is in itself a violation of the ordinance by an employer, and the very evidence that showed that petitioner published such advertising necessarily showed that it aided or participated in such violations by employers.

[5] The ordinance specifically provides for a certificate of exemption where bona fide occupational requirements are involved (Section 8, 7(d), A. 420a, 418a). No such certificates have been requested since the ordinance was amended in 1969 to prohibit sex discrimination (Pet. App. 13a). Nevertheless, the court below modified the Commission's order to permit petitioner to use sex-designated want-ad columns for advertisements by employers with certificates indicating a bona fide requirement for a particular sex (A. 399a-400a). Therefore, no jobs with bona fide sexual qualifications are involved in this case.

Nor is there anything irrational about the legislative determination here that the prohibition of such advertising should run not only against employers placing the advertisements, but also against those whose publication of the advertisements is also essential to their existence. The soundness of that decision is particularly evident in this case, since the system of sex-segregated want-ad columns chosen by the petitioner not only affords advertisers the vehicle for discrimination, but also places obstacles in the path of those wishing to comply with the ordinance. Because of petitioner's conduct, such advertisers are forced to assume additional expense by placing advertisements in both the male and female columns or to resort to the male-female column conceded by petitioner to be less effective (A. 161a). It is thus clear that petitioner was here held accountable for its own acts, and not for those of anyone else, however culpable others may also be.

There remains only the question whether there is a rational basis for concluding that the placing of want-ads in columns headed "Job—Female Interest" and "Jobs—Male Interest" indicated "any discrimination because of * * * sex" (Section 8(e), as amended, A. 421a, 436a).[10]

The inherently discriminatory effect of sex-designated advertising was correctly recognized in *Hailes v. United Airlines*, 464 F. 2d 1006 (C.A. 5), a case

[10] "Discrimination" is defined in the ordinance to "include any difference in treatment based on" the described characteristic (Section 4(b), A. 413a).

dealing with sex discrimination against males. The court there explained that "* * * the placing of * * * [an advertisement] in the 'Help Wanted-Female' column without a corresponding ad in the 'Help Wanted-Male' column * * * plainly indicates a preference for females" (*id.* at 1009).

The fact that petitioner here has changed the headings from the "Male Help Wanted" and "Female Help Wanted" designations previously used (Pet. App. 22a), and added a disclaimer, does not change the utility of the categories as a means of indicating to persons seeking employment that those in the specified sexual category will be given preferential consideration. That remains the intended message,[11] and it continues to be so interpreted.[12] Therefore, the

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[11] As the Commission noted (Pet. App. 9a), this was admitted by the Classified Advertising Manager for the Press, who stated, "we try to find out what type of person they are looking for. Are they looking for a man, or are they looking for a woman! They know this. And they are interested or more interested in a man or more interested in a woman. They know this, and they state this. This is where they want it." A. 173a. See also A. 117a–118a.

[12] There is ample evidence in the record that the captions do have an inhibiting effect, particularly on women seeking employment. Of particular relevance is the testimony of Dr. Bem, a research scientist and professor of psychology at Carnegie-Mellon University (A. 64a), concerning a study she made which indicated that when jobs were segregated under the captions used by the Press, with the Press disclaimer prominently included, only 46% of the women in the study expressed as much interest in jobs labeled "male interest" as in those labeled "female interest," whereas when these same jobs appeared without reference to sex, 81% of the women preferred "male interest" jobs. Dr. Bem testified that these figures probably underestimate the extent to which sex-segregated want-ads discourage female applicants, since several women in the study

change in the form in which the message is delivered at most only diminishes its effectiveness, and was properly held to be immaterial. Indeed, since the amended ordinance, as construed, applies "*equally* to 'any difference in treatment based on race, color, religion, ancestry, national origin, place of birth, or sex'" (A. 392a; emphasis by the court below), this case would be essentially no different if petitioner had arranged its help-wanted advertisements into categories designated: "Jobs-White Interest" and "Jobs-Negro Interest." And as the court below further stated, "[w]e have long passed that point in the advancement of civil rights whereby a declaration of intent can be used to screen or [as a] defense for actual discrimination" (A. 390a). Accord, *Hailes, supra*, 464 F. 2d at 1009.

Nor were the courts below required to accept as a defense petitioner's contention (Pet. Br. 26–27) that there was no intent to discriminate, and that the headings merely recognize the fact that some positions are generally of more interest to women, and others to men.[11] The States are as free as Congress to adopt the policy in the equal employment field that if the effect of a particular practice is discriminatory, a good faith

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stated that it had never before occurred to them to look for jobs in the "male interest" column. Moreover, the women involved in the study were called upon only to express willingness to apply and were not actually obliged to expose themselves to the risk of encountering discrimination. A. 236a–241a. See also A. 40a, 51a–53a, 109a–113a.

[11] Of course, the study referred to in n. 12, *supra*, indicates that many of the advertised positions were ones in which many women would be interested if they were not deterred by the inhibiting effect of the sex-designated headings.

intent will not justify the practice in the absence of overriding business necessity for it. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424.

In sum, petitioner's contention that it was denied due process of law is not well taken. Far from being irrational or arbitrary, the legislative policy reflected irrational or arbitrary, the Pittsburgh ordinance, as construed and applied, reflects an entirely suitable means of implementing the underlying legislative policy.

## II

### THE PITTSBURGH ORDINANCE, AS CONSTRUED AND APPLIED TO PETITIONER, IS CONSISTENT WITH THE FIRST AMENDMENT

It has long been settled that the fact that newspapers are engaged in the dissemination of protected ideas does not insulate them from otherwise valid regulation of their economic activities. *Lorain Journal Co.* v. *United States*, 342 U.S. 143; *Associated Press* v. *United States*, 326 U.S. 1; *Associated Press* v. *National Labor Relations Board*, 301 U.S. 103.[14] As Mr. Justice Harlan explained the matter for four members of the Court in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 150:

> The fact that dissemination of information and opinion on questions of public concern is ordinarily a legitimate, protected and indeed

[14] Nor is it unconstitutional for such regulation to impose a reasonable, nondiscriminatory economic burden on a newspaper publisher. See, *e.g.*, *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (upholding application of the Fair Labor Standards Act to a newspaper publishing business); *Murdock* v. *Pennsylvania*, 319 U.S. 105; *Grosjean* v. *American Press Co.*, 297 U.S. 233.

cherished activity does not mean, however, that one may in all respects carry on that activity exempt from sanctions designed to safeguard the legitimate interests of others. A business "is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others." *Associated Press* v. *Labor Board*, 301 U.S. 103, 132–133.

The narrow prohibition against the arrangement of classified advertisements here involved applies only to purely commercial advertising and does not affect the editorial, reporting or news gathering functions of the newspaper. A State, in the interest of protecting the right to equal employment opportunity, may properly regulate such commercial advertising of products or services. The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States*, 354 U.S. 476, 484. It does not protect expression which is not an "essential part of any exposition of ideas." *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572.

Advertisements may, as this Court held in *New York Times* v. *Sullivan*, 376 U.S. 254, fall within the protection of the First Amendment when they serve an editorial purpose of communicating ideas or provoking discussion. The undue burdening of "editorial advertisements" was there held impermissible since it "might shut off an important outlet for the promulgation of information and ideas by persons who do

*Capital Broadcasting Co.* v. *Acting Attorney General*, 405 U.S. 1000, affirming 333 F. Supp. 582 (D. D.C.); *Railway Express Agency* v. *New York*, 336 U.S. 106; *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112.

Although petitioner contends (Pet. Br. 15) that its arrangement of employment advertisements implicitly involves protected communication of ideas, the only message meaningfully communicated by the headings is that employers advertising thereunder will discriminate in their hiring. Petitioner is, of course, free to publish news stories informing the public that certain employers are engaging in discriminatory hiring; but commercial advertising of prohibited services, activities or products—which is all that is involved here—is not constitutionally protected speech. See, *e.g.*, *Donaldson* v. *Read Magazine, Inc.*, 333 U.S. 178, 191; and authorities collected in *New York State Broadcasters Ass'n* v. *United States*, 414 F. 2d 990, 996-997 (C.A. 2) ("Clearly an advertisement listing the names and addresses of sellers of narcotics or of fraudulent stock could constitutionally be banned.").

## CONCLUSION

For the reasons stated above, the judgment of the Commonwealth Court of Pennsylvania should be affirmed.

Respectfully submitted.

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MARCH 1973.

U.S. GOVERNMENT PRINTING OFFICE: 1973

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

## Syllabus

## PITTSBURGH PRESS CO. *v.* PITTSBURGH COMMISSION ON HUMAN RELATIONS ET AL.

### CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 72–419. Argued March 20, 1973—Decided June 21, 1973

Following a complaint and hearing, respondent Pittsburgh Commission on Human Relations held that petitioner had violated a city ordinance by using an advertising system in its daily newspaper whereby employment opportunities are published under headings designating job preference by sex. On appeal from affirmance of the Commission's cease-and-desist order, the court below barred petitioner from referring to sex in employment headings, unless the want-ads placed beneath them relate to employment opportunities not subject to the ordinance's prohibition against sex discrimination. Petitioner contends that the ordinance contravenes its constitutional rights to freedom of the press. *Held:* The Pittsburgh ordinance as construed to forbid newspapers to carry sex-designated advertising columns for non-exempt job opportunities does not violate petitioner's First Amendment rights. Pp. 5–14.

(a) The advertisements here, which did not implicate the newspaper's freedom of expression or its financial viability, were "purely commercial advertising," which is not protected by the First Amendment. *Valentine* v. *Chrestensen*, 316 U. S. 52, 54. *New York Times Co.* v. *Sullivan*, 376 U. S. 254, distinguished. Pp. 7–11.

(b) Petitioner's argument against maintaining the *Chrestensen* distinction between commercial and other speech is unpersuasive in the context of a case like this, where the regulation of the want-ads was incidental to and co-extensive with the regulation of employment discrimination. Pp. 11–13.

Syllabus

(c) The Commission's order, which was clear and r
than necessary, is not a prior restraint endangering arg
tected speech. Pp. 13–14.

4 Pa. Commw. 448, 287 A. 2d 161, affirmed.

POWELL, J., delivered the opinion of the Court, in which
WHITE, MARSHALL, and REHNQUIST, JJ., joined. BURG
and DOUGLAS, J., filed dissenting opinions. STEWART, J
dissenting opinion, in which DOUGLAS, J., joined. BLAC
filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

# SUPREME COURT OF THE UNITED STATES

No. 72–419

Pittsburgh Press Company, Petitioner, v. The Pittsburgh Commission on Human Relations et al. } On Writ of Certiorari to the Commonwealth Court of Pennsylvania.

[June 21, 1973]

MR. JUSTICE POWELL delivered the opinion of the Court.

The Human Relations Ordinance of the City of Pittsburgh (the "Ordinance") has been construed below by the courts of Pennsylvania as forbidding newspapers to carry "help-wanted" advertisements in sex-designated columns except where the employer or advertiser is free to make hiring or employment referral decisions on the basis of sex. We are called upon to decide whether the Ordinance as so construed violates the freedoms of speech and of the press guaranteed by the First and Fourteenth Amendments. This issue is a sensitive one, and a full understanding of the context in which it arises is critical to its resolution.

## I

The Ordinance proscribes discrimination in employment on the basis of race, color, religion, ancestry, national origin, place of birth, or sex.[1] In relevant part,

[1] The full text of the Ordinance and the 1969 amendment adding sex to the list of proscribed classifications is reproduced in the Appendix. App., pp. 410a–436a.

§ 8 of the Ordinance declares it to be unlawful employment practice, "except where based upon a bona fide occupational exemption certified by the Commission":

> "(a) For any employer to refuse to hire any person or otherwise discriminate against any person with respect to hiring . . . because of . . . sex.
>
> . . . . . .
>
> "(e) For any 'employer,' employment agency or labor organization to publish or circulate, or to cause to be published or circulated, any notice or advertisement relating to 'employment' or membership which indicates any discrimination because of . . . sex.
>
> . . . . . .
>
> "(j) For any person, whether or not an employer, employment agency or labor organization, to aid . . . in the doing of any act declared to be unlawful by this ordinance . . . ."

The present proceedings were initiated on October 9, 1969, when the National Organization for Women, Inc. (NOW) filed a complaint with the Pittsburgh Commission on Human Relations (the "Commission"), which is charged with implementing the Ordinance. The complaint alleged that the Pittsburgh Press Co. ("Pittsburgh Press") was violating § 8 (j) of the Ordinance by "allowing employers to place advertisements in the male or female columns, when the jobs advertised obviously do not have bona fide occupational qualifications or exceptions . . . ." Finding probable cause to believe that Pittsburgh Press was violating the Ordinance, the Commission held a hearing, at which it received evidence and heard argument from the parties and from other interested organizations. Among the exhibits introduced at the hearing were clippings from the help-wanted advertisements carried in the January 4, 1970, edition of

the Sunday Pittsburgh Press, arranged by column.[2] In many cases, the advertisements consisted simply of the job title, the salary, and the employment agency carrying the listing, while others included somewhat more extensive job descriptions.[3]

On October 23, 1970, the Commission issued a Decision and Order.[4] It found that during 1969 Pittsburgh Press carried a total of 248,000 help-wanted advertisements; that its practice before October, 1969, was to use columns captioned "Male Help Wanted," "Female Help Wanted," and "Male-Female Help Wanted"; that it thereafter used the captions "Jobs—Male Interest," "Jobs—Female Interest," and "Male-Female"; and that the advertisements were placed in the respective columns according to the advertiser's wishes, either volunteered by the advertiser or offered in response to inquiry by Pittsburgh Press.[5] The Commission first concluded that § 8 (e) of the Ordinance forbade employers, employment agencies, and labor organizations from submitting advertisements for placement in sex-designated columns. It then held that Pittsburgh Press, in violation of § 8 (j), aided the advertisers by maintaining a sex-designated classification system. After specifically considering and rejecting the

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[2] These exhibits are reproduced in the Appendix. App., pp. 290a–333a.

[3] For examples of these want-ads, see the Appendix to this opinion, pp. 15–16.

[4] The full text of the Commission's Decision and Order is set forth in the Appendix to the Petition for Certiorari. Pet. App., pp. 1a–18a.

[5] The Commission specifically found that:

"5. The Pittsburgh Press permits the advertiser to select the column within which its advertisement is to be inserted.

"6. When an advertiser does not indicate a column, the Press asks the advertiser whether it wants a male or female for the job and then inserts the advertisement in the jobs—male interest or jobs—female interest column accordingly." Pet. App., p. 16a.

argument that the Ordinance violated the First Amendment, the Commission ordered Pittsburgh Press to cease and desist such violations and to utilize a classification system with no reference to sex. This order was affirmed in all relevant respects by the Court of Common Pleas.[6]

On appeal in the Commonwealth Court, the scope of the order was narrowed to allow Pittsburgh Press to carry advertisements in sex-designated columns for jobs exempt from the antidiscrimination provisions of the Ordinance. As pointed out in that court's opinion, the Ordinance does not apply to employers of fewer than five persons, to employers outside the city of Pittsburgh, or to religious, fraternal, charitable or sectarian organizations, nor does it apply to employment in domestic service or in jobs for which the Commission has certified a bona fide occupational exception. The modified order bars "all reference to sex in employment advertising column headings, except as may be exempt under said Ordinance, or as may be certified as exempt by said Commission." 4 Pa. Commw., 448, 470, 287 A. 2d 161, 172 (1972). The Pennsylvania Supreme Court denied review, and we granted certiorari to decide whether, as Pittsburgh Press contends, the modified order violates the First Amendment by restricting its editorial judgment. 409 U. S. 1036 (1972).[7] We affirm.

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[6] See Pet. App., p. 19a.

[7] Pittsburgh Press also argues that the Ordinance violates due process in that there is no rational connection between sex-designated column headings and sex discrimination in employment. It draws attention to a disclaimer which it runs at the beginning of each of the "Jobs—Male Interest" and "Jobs—Female Interest" columns:

"Notice to Job Seekers"

"Jobs are arranged under Male and Female classifications for the convenience of our readers. This is done because most jobs generally appeal more to persons of one sex than the other. Various laws and ordinances—local, state and federal, prohibit discrimination

## II

There is little need to reiterate that the freedoms of speech and of the press rank among our most cherished liberties. As Mr. Justice Black put it, "In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy." *New York Times* v. *United States*, 403 U. S. 713, 717 (1971) (concurring opinion). The durability of our system of self-government hinges upon the preservation of these freedoms.

> "[S]ince informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern . . . . A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves." *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250 (1936).

The repeated emphasis accorded this theme in the decisions of this Court serves to underline the narrowness of the recognized exceptions to the principle that the press

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in employment because of sex unless sex is a bona fide occupational requirement. Unless the advertisement itself specifies one sex or the other, job seekers should assume that the advertiser will consider applicants of either sex in compliance with the laws against discrimination."

It suffices to dispose of this contention that the Commission's common-sense recognition that the two are connected is supported by evidence in the present record. See App., pp. 236a–239a. See also *Hailes* v. *United Air Lines*, 464 F. 2d 1006, 1009 (CA5 1972). The Guidelines on Discrimination Because of Sex of the Federal Equal Employment Opportunity Commission reflect a similar conclusion. See 29 CFR § 1604.4.

may not be regulated by the Government. Our inquiry must therefore be whether the challenged order falls within any of these exceptions.

At the outset, however, it is important to identify with some care the nature of the alleged abridgment. This is not a case in which the challenged law arguably disables the press by undermining its institutional viability. As the press has evolved from an assortment of small printers into a diverse aggregation including large publishing empires as well, the parallel growth and complexity of the economy have led to extensive regulatory legislation from which "[t]he publisher of a newspaper has no special immunity." *Associated Press* v. *NLRB*, 301 U. S. 103, 132 (1937). Accordingly, this Court has upheld application to the press of the National Labor Relations Act, *id.*, the Fair Labor Standards Act, *Mabee* v. *White Plains Publishing Co.*, 327 U. S. 178 (1946); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186 (1946), and the Sherman Antitrust Act, *Associated Press* v. *United States*, 326 U. S. 1 (1945); *Citizen Publishing Co.* v. *United States*, 394 U. S. 131 (1969). See also *Branzburg* v. *Hayes*, 408 U. S. 665 (1972). Yet the Court has recognized on several occasions the special institutional needs of a vigorous press by striking down laws taxing the advertising revenue of newspapers with circulations in excess of 20,000, *Grosjean* v. *American Press Co.*, *supra*, requiring a license for the distribution of printed matter, *Lovell* v. *Griffin*, 303 U. S. 444 (1938), and prohibiting the door-to-door distribution of leaflets, *Martin* v. *Struthers*, 319 U. S. 141 (1943).[8]

But no suggestion is made in this case that the Pittsburgh Ordinance was passed with any purpose of muzzling or curbing the press. Nor does Pittsburgh Press

[8] See also *Jones* v. *Opelika*, 319 U. S. 103 (1943); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943).

argue that the Ordinance threatens its financial viability[9] or impairs in any significant way its ability to publish and distribute its newspaper. In any event, such a contention would not be supported by the record.

## III

In a limited way, however, the Ordinance as construed does affect the makeup of the help-wanted section of the newspaper. Under the modified order, Pittsburgh Press will be required to abandon its present policy of providing sex-designated columns and allowing advertisers to select the columns in which their help-wanted advertisements will be placed. In addition, the order does not allow Pittsburgh Press to substitute a policy under which it would make an independent decision regarding placement in sex-designated columns.

Respondents rely principally on the argument that this regulation is permissible because the speech is commercial speech unprotected by the First Amendment. The commercial speech doctrine is traceable to the brief opinion in *Valentine* v. *Chrestensen*, 316 U. S. 52 (1942), sustaining a city ordinance which had been interpreted to ban the distribution by handbill of an advertisement soliciting customers to pay admission to tour a submarine. Mr. Justice Roberts, speaking for a unanimous Court, said:

> "We are . . . clear that the Constitution imposes no such restraint . . . on government as respects purely commercial advertising." 316 U. S., at 54.

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[9] In response to questioning at oral argument, counsel for Pittsburgh Press stated only:

"Now, I'm not prepared to answer whether the company makes money on [want-ads] or not. I suspect it does. They charge for want-ads, and they do make a lot of their revenue in the newspaper through advertising, of course; and I suspect it is profitable." Tr. of Oral Arg., p. 10.

Subsequent cases have demonstrated, however, that speech is not rendered commercial by the mere fact that it relates to an advertisement. In *New York Times* v. *Sullivan*, 376 U. S. 254 (1964), a city official of Montgomery, Alabama, brought a libel action against four clergymen and the New York Times. The names of the clergymen had appeared in an advertisement, carried in the Times, criticizing police action directed against members of the civil rights movement. In holding that this political advertisement was entitled to the same degree of protection as ordinary speech, the Court stated:

> "That the Times was paid for publishing this advertisement is as immaterial in this connection as is the fact that newspapers and books are sold." 376 U. S., at 266.

See also *Smith* v. *California*, 361 U. S. 147 (1959); *Ginzburg* v. *United States*, 383 U. S. 463, 474 (1966). If a newspaper's profit motive were determinative, all aspects of its operations—from the selection of news stories to the choice of editorial position—would be subject to regulation if it could be established that they were conducted with a view toward increased sales. Such a basis for regulation clearly would be incompatible with the First Amendment.

The critical feature of the advertisement in *Valentine* v. *Chrestensen* was that, in the Court's view, it did no more than propose a commercial transaction, the sale of admission to a submarine. In *New York Times* v. *Sullivan*, MR. JUSTICE BRENNAN for the Court found the *Chrestensen* advertisement easily distinguishable:

> "The publication here was not a 'commercial' advertisement in the sense in which the word was used in *Chrestensen*. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on be-

half of a movement whose existence and objectives are matters of the highest public interest and concern." 376 U. S., at 266.

In the crucial respects, the advertisements in the present record resemble the *Chrestensen* rather than the *Sullivan* advertisement. None expresses a position on whether, as a matter of social policy, certain positions ought to be filled by members of one or the other sex, nor does any of them criticize the Ordinance or the Commission's enforcement practices. Each is no more than a proposal of possible employment. The advertisements are thus classic examples of commercial speech.

But Pittsburgh Press contends that *Chrestensen* is not applicable, as the focus in this case must be upon the exercise of editorial judgment by the newspaper as to where to place the advertisement rather than upon its commerical content. The Commission made a finding of fact that Pittsburgh Press defers in every case to the advertiser's wishes regarding the column in which a want-ad should be placed. It is nonetheless true, however, that the newspaper does make a judgment whether or not to allow the advertiser to select the column. We must therefore consider whether this degree of judgmental discretion by the newspaper with respect to a purely commercial advertisement is distinguishable, for the purposes of First Amendment analysis, from the content of the advertisement itself. Or, to put the question differently, is the conduct of the newspaper with respect to the employment want-ad entitled to a protection under the First Amendment which the Court held in *Chrestensen* was not available to a commercial advertiser?

Under some circumstances, at least, a newspaper's editorial judgments in connection with an advertisement take on the character of the advertisement and, in those cases, the scope of the newspaper's First Amendment pro-

tection may be affected by the content of the advertisement. In the context of a libelous advertisement, for example, this Court has held that the First Amendment does not shield a newspaper from punishment for libel when with actual malice it publishes a falsely defamatory advertisement. *New York Times* v. *Sullivan*, *supra*, 376 U. S., at 279–280. Assuming the requisite state of mind, then, nothing in a newspaper's editorial decision to accept an advertisement changes the character of the falsely defamatory statements. The newspaper may not defend a libel suit on the ground that the falsely defamatory statements are not its own.

Similarly, a commercial advertisement remains commercial in the hands of the media, at least under some circumstances.[10] In *Capital Broadcasting Co.* v. *Acting Attorney General*, 405 U. S. 1000 (1972), aff'g 333 F. Supp. 582 (DDC 1971), this Court summarily affirmed a district court decision sustaining the constitutionality of 15 U. S. C. § 1335, which prohibits the electronic media from carrying cigarette advertisements. The District Court there found that the advertising should be treated as commercial speech, even though the First Amendment challenge was mounted by radio broadcasters rather than by advertisers. Because of the peculiar characteristics of the electronic media, *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 226–227 (1943), *Capital Broadcasting* is not dispositive here on the ultimate question of the constitutionality of the Ordinance. Its significance lies, rather, in its recognition that the exer-

[10] In *Head* v. *New Mexico Board*, 374 U. S. 424 (1963), this Court upheld an injunction prohibiting a newspaper and a radio station from carrying optometrists' advertisements which violated New Mexico law. But because the issue had not been raised in the lower courts, this Court did not consider the parties' First Amendment challenge. 374 U. S., at 432 n. 12.

cise of this kind of editorial judgment does not necessarily strip commercial advertising of its commercial character.[11]

As for the present case, we are not persuaded that either the decision to accept a commercial advertisement which the advertiser directs to be placed in a sex-designated column or the actual placement there lifts the newspaper's actions from the category of commercial speech. By implication at least, an advertiser whose want-ad appears in the "Jobs—Male Interest" column is likely to discriminate against women in his hiring decisions. Nothing in a sex-designated column heading sufficiently dissociates the designation from the want-ads placed beneath it to make the placement severable for First Amendment purposes from the want-ads themselves. The combination, which conveys essentially the same message as an overtly discriminatory want-ad, is in practical effect an integrated commerical statement.

Pittsburgh Press goes on to argue that if this package of advertisement and placement is commercial speech, then commercial speech should be accorded a higher level of protection than *Chrestensen* and its progeny would suggest. Insisting that the exchange of information is as important in the commercial realm as in any other, the newspaper here would have us abrogate the distinction between commercial and other speech.

Whatever the merits of this contention may be in other contexts, it is unpersuasive in this case. Discrimination

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[11] See also *New York State Broadcasters Association* v. *United States*, 414 F. 2d 990 (CA2 1969), cert. denied, 396 U. S. 1061 (1970) (refusing to strike down a ban on broadcasts promoting a lottery).

[12] See Note, Freedom of Expression in a Commercial Context, 78 Harv. L. Rev. 1191, 1195–1196 (1965). Cf. *Capital Broadcasting Co.* v. *Acting Attorney General*, *supra*, 333 F. Supp., at 593 n. 42 (Wright, J., dissenting); *Camp-of-the-Pines Inc.* v. *New York Times Co.*, 184 Misc. 389, 53 N. Y. S. 2d 475 (1945).

in employment is not only commercial activity, it is *illegal* commercial activity under the Ordinance. We have no doubt that a newspaper constitutionally could be forbidden to publish a want-ad proposing a sale of narcotics or soliciting prostitutes. Nor would the result be different if the nature of the transaction were indicated by placement under columns captioned "Narcotics for Sale" and "Prostitutes Wanted" rather than stated within the four corners of the advertisement.

The illegality in this case may be less overt, but we see no difference in principle here. Sex discrimination in nonexempt employment has been declared illegal under § 8 (a) of the Ordinance, a provision not challenged here. And § 8 (e) of the Ordinance forbids any employer, employment agency, or labor union to publish or cause to be published any advertisement "indicating" sex discrimination. This, too, is unchallenged. Moreover, the Commission specifically concluded that it is an unlawful employment practice for an advertiser to cause an employment advertisement to be published in a sex-designated column.

Section 8 (j) of the Ordinance, the only provision which Pittsburgh Press was found to have violated and the only provision under attack here, makes it unlawful for "any person . . . to aid . . . in the doing of any act declared to be unlawful by this ordinance." The Commission and the courts below concluded that the practice of placing want-ads for nonexempt employment in sex-designated columns did indeed "aid" employers to indicate illegal sex preferences. The advertisements, as embroidered by their placement, signaled that the advertisers were likely to show an illegal sex preference in their hiring decisions. Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the

governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.

## IV

It is suggested, in the brief of an *amicus curiae*, that apart from other considerations, the Commission's order should be condemned as a prior restraint on expression.[12] As described by Blackstone, the protection against prior restraint at common law barred only a system of administrative censorship:

> "To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government." 4 Bl. Comm. 152.

While the Court boldly stepped beyond this narrow doctrine in *Near* v. *Minnesota*, 283 U. S. 697 (1931), in striking down an injunction against further publication of a newspaper found to be a public nuisance, it has never held that all injunctions are impermissible. See *Lorain Journal Co.* v. *United States*, 342 U. S. 143 (1951). The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment. The present order does not endanger arguably protected speech. Because the order is based on a continuing course of repetitive conduct, this is not a case in

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[12] Brief for *Amicus Curiae* The American Newspaper Publishers Association, p. 23 n. 32.

which the Court is asked to speculate as to the effect of publication. Cf. *New York Times v. United States*, *supra*. Moreover, the order is clear and sweeps no more broadly than necessary. And because no interim relief was granted, the order will not have gone into effect until it was finally determined that the actions of Pittsburgh Press were unprotected.[14]

## V

We emphasize that nothing in our holding allows government at any level to forbid Pittsburgh Press to publish and distribute advertisements commenting on the Ordinance, the enforcement practices of the Commission, or the propriety of sex preferences in employment. Nor, *a fortiori*, does our decision authorize any restriction whatever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists, or its contributors. On the contrary, we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and

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[14] The dissent of THE CHIEF JUSTICE argues that Pittsburgh Press is in danger of being "subjected to summary punishment for contempt for having made an 'unlucky' legal guess." *Post*, p. —. The Commission is without power to punish summarily for contempt. When it concludes that its order has been violated, "the Commission shall certify the case and the entire record of its proceedings to the City Solicitor, who shall invoke the aid of an appropriate court to secure enforcement or compliance with the order or to impose [a fine of not more than $300.00] or both." § 14 of the Ordinance. Pet. App., p. 103a. But more fundamentally, it was the newspaper's *policy* of allowing employers to place advertisements in sex-designated columns without regard to the exceptions or exemptions contained in the Ordinance, not its treatment of particular want-ads, which was challenged in the complaint and was found by the Commission and the courts below to be violative of the Ordinance. Nothing in the modified order or the opinions below prohibits the newspaper from relying in good faith on the representation of an advertiser that a particular job falls within an exception to the Ordinance.

other issues, however controversial. We hold only that the Commission's modified order, narrowly drawn to prohibit placement in sex-designated columns of advertisements for nonexempt job opportunities, does not infringe the First Amendment rights of Pittsburgh Press.

*Affirmed.*

## APPENDIX

Among the advertisements carried in the Sunday Pittsburgh Press on January 4, 1970, was the following one, submitted by an employment agency and placed in the "JOBS—MALE INTEREST" column:

| | |
|---|---|
| ACAD. INSTRUCTORS | $13,000 |
| ACCOUNTANTS | 10,000 |
| ADM. ASS'T, CPA | 15,000 |
| ADVERTISING MGR. | 10,000 |
| BOOKKEEPER F-C | 9,000 |
| FINANCIAL CONSULTANT | 12,000 |
| MARKETING MANAGER | 15,000 |
| MGMT. TRAINEE | 8,400 |
| OFFICE MGR. TRAINEE | 7,200 |
| LAND DEVELOPMENT | 30,000 |
| PRODUCT. MANAGER | 18,000 |
| PERSONNEL MANAGER | OPEN |
| SALES-ADVERTISING | 8,400 |
| SALES-CONSUMER | 9,600 |
| SALES-INDUSTRIAL | 12,000 |
| SALES-MACHINERY | 8,400 |
| RETAIL MGR. | 15,000 |

Most Positions Fee Paid
EMPLOYMENT SPECIALISTS
2248 Oliver Bldg. 261-2250
Employment Agency

App., p. 31la.

On the same day, the same agency's advertisement in the "JOBS—FEMALE INTEREST" column was as follows:

| | |
|---|---|
| ACAD. INSTRUCTORS | $13,000 |
| ACCOUNTANTS | 6,000 |
| AUTO-INS. UNDERWRITER | OPEN |
| BOOKKEEPER-INS | 5,000 |
| CLERK-TYPIST | 4,200 |
| DRAFTSMAN | 6,000 |
| KEYPUNCH D. T. | 6,720 |
| KEYPUNCH BEGINNER | 4,500 |
| PROOFREADER | 4,900 |
| RECEPTIONIST—Mature D. T. | OPEN |
| EXEC. SEC. | 6,300 |
| SECRETARY | 4,800 |
| SECRETARY, Equal Oppor. | 6,000 |
| SECRETARY D. T. | 5,400 |
| TEACHERS-Pt. Time | day 33. |
| TYPIST-Statistical | 5,000 |

Most Positions Fee Paid
EMPLOYMENT SPECIALISTS
2248 Oliver Bldg. 261-2250
Employment Agency

App., p. 31la.

Characteristic of those offering fuller job descriptions was the following advertisement, carried in the "JOBS—MALE INTEREST" column:

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STAFF MANAGEMENT TRAINEE
TO $12,000

If you have had background in the management of small business then this could be the stepping stone you have been waiting for. You will be your own boss with no cash outlay. Call or write today.

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App., p. 313a.

# SUPREME COURT OF THE UNITED STATES

No. 72-419

Pittsburgh Press Company, Petitioner, v. The Pittsburgh Commission on Human Relations et al. } On Writ of Certiorari to the Commonwealth Court of Pennsylvania.

[June 21, 1973]

MR. CHIEF JUSTICE BURGER, dissenting.

Despite the Court's efforts to decide only the most narrow question presented in this case, the holding represents, for me, a disturbing enlargement of the "commercial speech" doctrine, *Valentine* v. *Chrestensen*, 316 U. S. 52 (1942), and a serious encroachment on the freedom of press guaranteed by the First Amendment. It also launches the courts on what I perceive to be a treacherous path of defining what layout and organizational decisions of newspapers are "sufficiently associated" with the "commercial" parts of the papers as to be constitutionally unprotected and therefore subject to governmental regulation. Assuming, *arguendo*, that the First Amendment permits the States to place restrictions on the content of commercial advertisements, I would not enlarge that power to reach the layout and organizational decisions of a newspaper.

Pittsburgh Press claims to have decided to use sex-designated column headings in the classified advertising section of its newspapers to facilitate the use of classified ads by its readers. Not only is this purpose conveyed to the readers in plain terms, but the newspaper also explicitly cautions readers against interpreting the column headings as indicative of sex discrimination. Thus,

before each column heading the newspaper prints the following "Notice to Job Seekers":

> "Jobs are arranged under Male and Female classifications for the convenience of our readers. This is done because most jobs generally appeal more to persons of one sex than the other. Various laws and ordinances—local, state and federal, prohibit discrimination in employment because of sex unless sex is a bona fide occupational requirement. Unless the advertisement itself specifies one sex or the other, job seekers should assume that the advertiser will consider applicants of either sex in compliance with the laws against discrimination."

To my way of thinking, Pittsburgh Press has clearly acted within its protected journalistic discretion in adopting this arrangement of its classified advertisements. Especially in light of the newspaper's "Notice to Job Seekers," it is unrealistic for the Court to say, as it does, that the sex-designated column headings are not "sufficiently dissociate[d]" from the "want-ads placed beneath [them] to make the placement severable for First Amendment purposes from the want-ads themselves."[1] P. 11, *ante*. In any event, I believe the First Amendment

[1] The Court and the opinions under review place great stress on the finding of the Pittsburgh Commission on Human Relations that the Pittsburgh Press "permits the advertiser to select the column within which its advertisement is to be inserted." That finding, however, does not disprove Pittsburgh Press' claim that it uses column headings for the convenience of its readers. In any event, the order under review, as the Court acknowledges, "does not allow Pittsburgh Press to substitute a policy under which it would make an independent decision regarding placement in sex-designated columns." P. 7, *ante*. Thus, even if the newspaper became actively involved in selecting the appropriate column for each advertisement, presumably the Commission's order would still prohibit Pittsburgh Press from using the column headings.

freedom of press includes the right of a newspaper to arrange the content of its paper, whether it be news items, editorials or advertising, as it sees fit.[2] In the final analysis, the readers are the ultimate "controllers" no matter what excesses are indulged in by even a flamboyant or venal press; that it often takes a long time for these influences to bear fruit is inherent in our system.

The Court's conclusion that the Commission's cease and desist order does not constitute a prior restraint gives me little reassurance. That conclusion is assertedly based on the view that the order affects only a "continuing course of repetitive conduct." P. 13, *ante*. Even if that were correct, I would still disagree since the Commission's order appears to be in effect an outstanding *injunction* against certain publications—the essence of a prior restraint. In any event, my understanding of the effects of the Commission's order differs from that of the Court. As noted in the Court's opinion, the Commonwealth Court narrowed the injunction to permit Pittsburgh Press to use sex-designated column headings for want-ads dealing with jobs exempt under the Ordinance. The Ordinance does not apply, for example,

> "to employers of fewer than five persons, to employers outside the city of Pittsburgh, or to religious, fraternal, charitable or sectarian organizations, nor does it apply to employment in domestic service or in jobs for which the Commission has certified a bona fide occupational exception." P. 4, *ante*.

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[2] There would be time enough to consider whether this principle would apply to the situation hypothesized by the Court, for example, where a newspaper gives "notice" of narcotics transactions by placing certain advertisements under a "Narcotics for Sale" caption. For now I need only state that two situations strike me as being entirely different. We do not have here, in short, such a blatant involvement by a newspaper in a criminal transaction.

If Pittsburgh Press chooses to continue using its column headings for advertisements submitted for publication by exempted employers, it may well face difficult legal questions in deciding whether a particular employer is or is not subject to the Ordinance. If it makes the wrong decision and includes a covered advertisement under a sex-designated column heading, it runs the risk of being held in summary contempt for violating the terms of the order.[a]

In practical effect, therefore, the Commission's order in this area may have the same inhibiting effect as the injunction in *Near* v. *Minnesota*, 283 U. S. 697 (1931), which permanently enjoined the publishers of a newspaper from printing a "malicious, scandalous or defamatory newspaper, as defined by law." We struck down the injunction in *Near* as a prior restraint. In 1971, we reaffirmed the principle of presumptive unconstitutionality of prior restraint in *Organization For A Better Austin* v. *Keefe*, 402 U. S. 415. Indeed, in *New York Times Co.* v. *United States*, 403 U. S. 713 (1971), every member of the Court, tacitly or explicitly, accepted the *Near* and *Keefe* condemnation of prior restraint as presumptively unconstitutional. In this case, the respondents have, in my view, failed to carry their burden. I would therefore hold the Commission's order to be impermissible prior restraint. At the very least, we ought to make clear that a newspaper may not be subject to summary

[a] The Court's statement that the "Commission is without power to punish summarily for contempt," p. 14 n. 14, *ante*, is hardly reassuring to me in a First Amendment setting. We are still left with no assurance that an enforcement action initiated at the request of the Commission will not be summary in nature. It is helpful that the Court expresses a caveat on this score. However, the weighty presumption of unconstitutionality of prior restraint of the press seems to be given less regard than we have traditionally accorded it.

punishment for contempt for having made an "unlucky" legal guess on a particular advertisement or for having failed to secure advance Commission approval of a decision to run an advertisement under a sex-designated column.

# SUPREME COURT OF THE UNITED STATES

No. 72-419

| | |
|---|---|
| Pittsburgh Press Company, Petitioner, v. The Pittsburgh Commission on Human Relations et al. | On Writ of Certiorari to the Commonwealth Court of Pennsylvania. |

[June 21, 1973]

MR. JUSTICE DOUGLAS, dissenting.

While I join the dissent of MR. JUSTICE STEWART, I add a few words. As he says, the press, like any other business, can be regulated on business and economic matters. Our leading case on that score is *Associated Press* v. *United States*, 326 U. S. 1, which holds that a news-gathering agency may be made accountable for violations of the antitrust laws. By like token, a newspaper, periodical, or TV or radio broadcaster may be subjected to labor relations laws. And that regulation could constitutionlly extend to the imposition of penalties or other sanctions if any unit of the press violated laws that barred discrimination in employment based on race or religion or sex.

Pennsylvania has a regulatory regime designed to eliminate discrimination in employment based on sex; and the commission in charge of that program issues cease and desist orders against violators. There is no doubt but that Pittsburgh Press would have no constitutional defense against such a cease and desist order issued against it for discriminatory employment practices.

But I believe that Pittsburgh Press by reason of the First Amendment may publish what it pleases about any law without censorship or restraint by Government. The

First Amendment does not require the press to reflect any ideological or political creed reflecting the dominant philosophy, whether transient or fixed. It may use its pages and facilities to denounce a law and urge its repeal or at the other extreme denounce those who do not respect its letter and spirit.

Commercial matter, as distinguished from news, was held in *Valentine* v. *Christensen*, 316 U. S. 52, not to be subject to First Amendment protection. My views on that issue have changed since 1942, the year *Valentine* was decided. As I have stated on earlier occasions I believe that commercial materials also have First Amendment protection. If Empire Industries Ltd., doing business in Pennsylvania, wanted to run full page advertisements denouncing or criticizing this Pennsylvania law, I see no way in which Pittsburgh Press could be censored or punished for running the ad, any more than a person could be punished for uttering the contents of the ad in a public address in Independence Hall. The *pros* and *cons* of legislative enactments are clearly discussion or dialogue that is highly honored in our First Amendment traditions.

The want ads which gave rise to the present litigation express the preference of one employer for the kind of help he needs. If he carried through to hiring and firing employees on the basis of those preferences, the state commission might issue a remedial order against him, if discrimination in employment was shown. Yet he could denounce that action with impunity and Pittsburgh Press could publish his denunciation or write an editorial taking his side also with impunity.

Where there is a valid law, the Government can enforce it. But there can be no valid law censoring the press or punishing it for publishing its views or the views of subscribers or customers who express their ideas in

letters to the editor or in want ads or other commercial space. There comes a time, of course, when speech and action are so closely brigaded that they are really one. Falsely shouting "fire" in a crowd, the example given by Mr. Justice Holmes, *Schenell* v. *United States*, 249 U. S. 47, 52, is one example. *Giboney* v. *Empire Storage Co.*, 336 U. S. 490, written by Mr. Justice Black is another. There are here, however, no such unusual circumstance.

As MR. JUSTICE STEWART says, we have witnessed a growing tendency to cut down the literal requirements of First Amendment freedoms so that those in power can squelch someone out of step. Historically the miscreant has usually been an unpopular minority. Today it is a newspaper that does not bow to the spreading bureaucracy that promises to engulf us. It may be that we have become so stereotyped as to have earned that fate. But the First Amendment presupposes free-wheeling, independent people whose vagaries include ideas spread across the entire spectrum of thoughts and beliefs.* I would let any expression in that broad spectrum

*As Alexander Meiklejohn has stated: "The First Amendment was not written primarily for the protection of those intellectual aristocrats who pursue knowledge solely for the fun of the game, whose search for truth expresses nothing more than a private intellectual curiosity or an equally private delight and pride in mental achievement. It was written to clear the way for thinking which serves the general welfare. It offers defense to men who plan and advocate and incite toward corporate action for the common good. On behalf of such men it tells us that every plan of action must have a hearing, every relevant idea of fact or value must have full consideration, whatever may be the dangers which that activity involves. It makes no difference whether a man is advocating conscription or opposing it, speaking in favor of a war against it, defending democracy or attacking it, planning a communist reconstruction of our economy or criticising it. So long as his active words are those of participation in public discussion and public decision of matters of public policy, the freedom of those words

flourish, unrestrained by Government, unless it was an integral part of action—the only point which in the Jeffersonian philosophy marks the permissible point of governmental intrusion.

I therefore dissent from affirmance of this judgment.

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may not be abridged. That freedom is the basic postulate of a society which is governed by the votes of its citizens." Free Speech and Its Relation to Self-Government (1948), pp. 45–46.

# SUPREME COURT OF THE UNITED STATES

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| Pittsburgh Press Company, Petitioner, v. The Pittsburgh Commission on Human Relations et al. | On Writ of Certiorari to the Commonwealth Court of Pennsylvania. |

[June 21, 1973]

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS joins, dissenting.

I have no doubt that it is within the police power of the city of Pittsburgh to prohibit discrimination in private employment on the basis of race, color, religion, ancestry, national origin, place of birth, or sex. I do not doubt, either, that in enforcing such a policy the city may prohibit employers from indicating any such discrimination when they make known the availability of employment opportunities. But neither of those propositions resolves the question before us in this case.

That question, to put it simply, is whether any government agency—local, state, or federal—can tell a newspaper in advance what it can print and what it cannot. Under the First and Fourteenth Amendments I think no government agency in this nation has any such power.[1]

It is true, of course, as the Court points out, that the publisher of a newspaper is amenable to civil and criminal laws of general applicability. For example, a news-

[1] I put to one side the question of governmental power to prevent publication of information that would clearly imperil the military defense of our Nation, *e. g.*, "the publication of the sailing dates of transports or the number or location of troops." *Near* v. *Minnesota*, 283 U. S. 697, 716.

paper publisher is subject to nondiscriminatory general taxation,[3] and to restrictions imposed by the National Labor Relations Act,[3] the Fair Labor Standards Act,[4] and the Sherman Act.[5] In short, as businessman or employer, a newspaper publisher is not exempt from laws affecting businessmen and employers generally. Accordingly, I assume that the Pittsburgh Press Company, as an employer, can be and is completely within the coverage of the Human Relations Ordinance of the city of Pittsburgh.

But what the Court approves today is wholly different. It approves a government order dictating to a publisher in advance how he must arrange the layout of pages in his newspaper.

Nothing in *Valentine* v. *Chrestensen*, 316 U. S. 52, remotely supports the Court's decision. That case involved the validity of a local sanitary ordinance that prohibited the distribution in the streets of "commercial and business advertising matter." The Court held that the ordinance could be applied to the owner of a commercial tourist attraction who wanted to drum up trade by passing out handbills in the streets. The Court said it was "clear that the Constitution imposes no such restraint on government as respects purely commercial advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be judged a derogation of the public right of user, are matters of legislative

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[3] See *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250; *Murdock* v. *Pennsylvania*, 319 U. S. 105, 112.

[3] See *Associated Press* v. *NLRB*, 301 U. S. 103, 132–133.

[4] See *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 192–193; *Mabee* v. *White Plains Publishing Co.*, 327 U. S. 178.

[5] See *Associated Press* v. *United States*, 326 U. S. 1; *Lorain Journal Co.* v. *United States*, 342 U. S. 143, 155–157; *Citizen Publishing Co.* v. *United States*, 394 U. S. 131, 139.

judgment." *Id.*, at 54. Whatever validity the *Chrestensen* case may still retain when limited to its own facts,[6] it certainly does not stand for the proposition that the advertising pages of a newspaper are outside the protection given the newspaper by the First and Fourteenth Amendments. Any possible doubt on that score was surely laid to rest in *New York Times Co.* v. *Sullivan*, 376 U. S. 254.[7]

So far as I know, this is the first case in this or any other American court that permits a government agency to enter a composing room of a newspaper and dictate to the publisher the layout and makeup of the newspaper's pages. This is the first such case, but I fear it may not be the last. The camel's nose is in the tent. "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way. . . ." *Boyd* v. *United States*, 116 U. S. 616, 635.

So long as Members of this Court view the First Amendment as no more than a set of "values" to be balanced against other "values," that Amendment will remain in

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[6] Mr. Justice Douglas has said that "[t]he [*Chrestensen*] ruling was casual, almost offhand. And it has not survived reflection." *Cammarano* v. *United States*, 358 U. S. 498, 514 (concurring opinion).

[7] The Court acknowledges, as it must, that what it approves today is not a restriction on a purely commercial advertisement but on the editorial judgment of the newspaper, for "the newspaper does make a judgment whether or not to allow the advertiser to select the column." *Ante*, p. —. The effect of the local Ordinance and the court order is to affect the makeup of the help-wanted section of the newspaper, and to preclude Pittsburgh Press from placing advertisements in sex-designated columns. The Court justifies this restriction on the newspaper's editorial judgment by arguing that they had taken on the "character of the advertisement" so that the combination conveyed "an integrated commercial statement." But the stark fact remains that the restriction here was placed on the editorial judgment of the newspaper, not the advertisement.

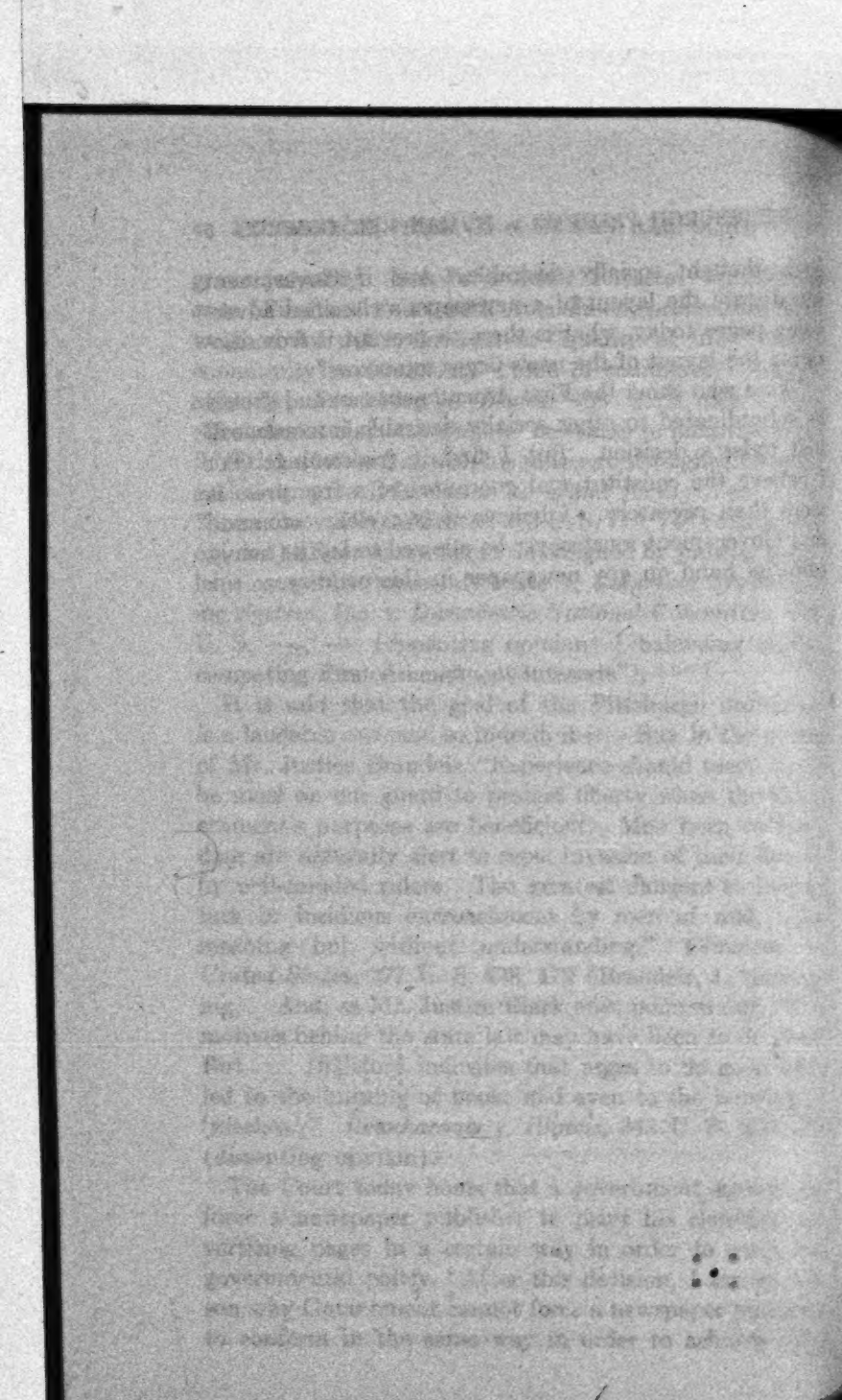
grave jeopardy. See *Paris Adult Theatre I* v. *Slaton*, *ante* (First and Fourteenth Amendment protections outweighed by public interest in "quality of life," "total community environment," "tone of commerce," "public safety"); *Branzburg* v. *Hayes*, 408 U. S. 665 (First Amendment claim asserted by newsman to maintain confidential relationship with his sources outweighed by obligation to give information to grand jury); *New York Times Co.* v. *United States*, 403 U. S. 713, 748 (dissenting opinion) (First Amendment outweighed by judicial problems caused by "unseemly haste"); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. —, — (dissenting opinion) ("balancing of the competing First Amendment interests").

It is said that the goal of the Pittsburgh ordinance is a laudable one, and so indeed, it is. But, in the words of Mr. Justice Brandeis, "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficient. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead* v. *United States*, 277 U. S. 438, 479 (Brandeis, J., dissenting). And, as Mr. Justice Black once pointed out, "The motives behind the state law may have been to do good. But . . . [h]istory indicates that urges to do good have led to the burning of books and even to the burning of 'witches.'" *Beauharnais* v. *Illinois*, 343 U. S. 250, 274 (dissenting opinion).

The Court today holds that a government agency can force a newspaper publisher to print his classified advertising pages in a certain way in order to carry out governmental policy. After this decision, I see no reason why Government cannot force a newspaper publisher to conform in the same way in order to achieve other

goals thought socially desirable. And if Government can dictate the layout of a newspaper's classified advertising pages today, what is there to prevent it from dictating the layout of the news pages tomorrow?

Those who think the First Amendment can and should be subordinated to other socially desirable interests will hail today's decision. But I find it frightening. For I believe the constitutional guarantee of a free press is more than precatory. I believe it is a clear command that Government must never be allowed to lay its heavy editorial hand on any newspaper in this country.



# SUPREME COURT OF THE UNITED STATES

No. 72-419

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|---|---|
| Pittsburgh Press Company, Petitioner, *v.* The Pittsburgh Commission on Human Relations et al. | On Writ of Certiorari to the Commonwealth Court of Pennsylvania. |

[June 21, 1973]

MR. JUSTICE BLACKMUN, dissenting.

I dissent substantially for the reasons stated by MR. JUSTICE STEWART in his opinion. But I do not subscribe to the statements contained in that paragraph of his opinion which begins on the bottom of p. 3.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-419

PITTSBURGH PRESS COMPANY, *Petitioner,*

v.

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS AND THE CITY OF PITTSBURGH,

AND

THE NATIONAL ORGANIZATION FOR WOMEN, INC., *Respondents.*

On Writ of Certiorari to the Commonwealth Court of Pennsylvania

## PETITION FOR REHEARING

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

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## PETITION FOR REHEARING

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Comes now the Pittsburgh Press Company, petitioner, pursuant to Rule 58(1) and for grounds for its petition for a rehearing on this Court's decision entered herein on June 21, 1973, respectfully states:

1. By holding that the editorial discretion and judgment exercised by the Pittsburgh Press in arranging the layout and format of advertising is not entitled to First Amendment protection, this Court has inadvertently provided states, counties and municipalities with awesome and devastating power sufficient to

choke off the economic lifeblood of newspapers an destroy the press.

History has shown that a strong and free press dependent from government is our great protecto individual liberty. In performing this role, the p is often called upon to inform the public of the act or inaction of government, whether or not it be f eral, state or local. Experience has also shown t political figures and political bodies subject to p scrutiny seek to retaliate against an unfavora press. *Grosjean v. American Press Co.*, 297 U.S. (1936). As Mr. Justice Stewart said in his dissent this case, "The camel's nose is in the tent." Gi the tool they have sought, county and city counc boards and commissions may now, if they choose, en an infinite variety of laws and ordinances regulati a newspaper's editorial discretion in the number, si placement, and content of ads, all under the guise police power. This Court has now held that the e torial judgment related to those matters falls fr First Amendment protection and is reduced to t status of an unprotected "commercial statement" cause the ultimate publication conveys a commerc message. It is now certainly conceivable that t enemies of the press on state and local levels cou for instance, ban the use of advertising inserts in newspaper on the ground that such inserts tend create excessive litter; ban display advertising fr classified columns on the ground that it favors larg advertisers; and regulate as to size and format, if n totally ban from publication, advertising for any co modity, product or service which a local political bo deemed to be not in the best interest of public heal and welfare. The frightening aspect of this new found power is compounded many fold when viewe

in light of the fact that many large newspapers may be subject to a hundred or more separate local jurisdictions including counties and cities where the newspaper is circulated. It is difficult to really conceive of the wide-ranging ramifications of the Court's decision. However, it can be anticipated that those governmental bodies whose activities demand the greatest exposure will be the most ingenious in devising ways to strike at the economic heart of the press.

This clear and alarming impact of the Court's decision on the vitality, if not the very existence, of a free press demonstrates the error of the holding that the combination of protected editorial judgment and unprotected want-ads reduces the combination thereof to an unprotected "commercial statement".

2. This Court should not permit the narrow factual circumstances of *Valentine v. Chrestensen*, 316 U.S. 52 (1942), to stand for the blanket proposition that all commercial speech has no First Amendment protection.

It is respectfully submitted that *Valentine*, when read in conjunction with *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), should not permit the overly simplistic conclusion that commercial speech has no First Amendment protection. In *Valentine*, the court stated that the extent to which a person may promote or pursue a gainful occupation in the streets and to what extent such activity shall be adjudged a derrogation of the public right of the user, are matters of legislative judgment. The thrust of the two decisions seems to be that where the end result of the publication is for a commercial or business purpose or for economic gain, the publication is not entitled to protection. The Court seems to look at the purpose of

the publication rather than the fact that it is a publication paid for at the expense of the advertisers in deciding whether or not it is commercial speech. In *Valentine*, the Court found the purpose of the publication was for economic gain of the advertiser, and in *Sullivan* the Court found that the purpose was political and social in nature. This is the approach which we respectfully submit is one that overlooks in its entirety the intent of the First Amendment under our economic system. For instance, tenants circulating handbills protesting rental increases by their landlord clearly have for their purpose an economic gain. Union members circulating handbills to the effect that an employer is unfair in not granting wage increases have as their purpose personal, economic gain. These same handbills printed in the form of an advertisement in a newspaper would be for the purpose of economic gain. Would the Court permit the enjoining of such activity? We think not. Help wanted ads often express the opinion of the advertiser relating to social philosophy, and they most certainly communicate information of a most necessary nature to the economic well-being of this county. Indeed, without help wanted ads and other business advertising, the economic system of this country would be seriously jeopardized.

If the content of commercial advertising and the newspaper's control thereof can be regulated, then we submit this Court has condoned the most serious inroad upon a vital and free press and the free exchange of information since this most cherished right was set forth in the First Amendment to our Constitution.

3. The Court erroneously concluded that the order of the Pittsburgh Commission on Human Relations

did not result in a constitutionally impermissible prior restraint on the press. The order is in the nature of an injunction forbidding the exercise of editorial judgment *in futuro*. This Court has permitted an indefinite injunction affecting editorial policy to remain against the Press. We respectfully submit that the Court has overlooked the pragmatic difficulties of operating a newspaper under such conditions. Each and every issue of the Press is covered by this injunction and the Press is exposed to the possibility of a multitude of actions against it for "unlucky guesses" as to the propriety of placing certain advertisements. It was a similar burden placed on newspapers which justified the rationale of *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), which rationale was amplified and extended in *Rosenbloom v. Metromedia,* 403 U.S. 29, 50 (1971). It is one thing to state, as the Court does in footnote 14 of its opinion, that a newspaper may rely in good faith on an advertiser's representation regarding coverage, but it is quite another to fail to recognize the pragmatic problems associated with after-the-fact administrative determinations of what action of the newspaper is or is not "good faith". It is difficult to imagine a more invidious design adversely affecting a newspaper's "institutional viability".

4. The Court's reliance on cases upholding regulatory legislation such as *Associated Press v. NLRB,* 301 U.S. 103 (1937), to justify its conclusion that the order does not affect the "institutional viability" of the Press is misplaced. In those cases such as *Associated Press,* the keystone was the fact that the regulations applied equally to newspapers, as well as other firms and entities. Moreover, the purely business function of a newspaper cannot be equated with its edi-

torial function, even though that editorial function is exercised for its readers and the production of income. Certainly, the courts cannot immerse themselves in the quagmire of deciding in each case the "degree" of editorial judgment involved. We submit that the First Amendment is not triggered by such measurement. In this case, the contested order can apply only to newspapers, and in particular to newspapers' editorial discretion on layout and design. For that reason alone, the wisdom of this Court's decision demands reflection.

5. The Commission below proceeded against the Pittsburgh Press rather than against culpable advertisers merely because the Press provided the Commission with a more convenient method of enforcing the Ordinance. This Court through its decision has permitted local agencies to make newspapers their enforcement arms. Indeed, this was the government's position in *United States v. Hunter,* 459 F.2d 205 (4th Cir. 1972), where instead of acting against the advertiser, the government proceeded against the newspaper because "the logical option would be to build a dam at some strategic spot in the flow of publication, such as the newspaper office."[1] Such a holding undermines the historical and necessary disassociation of the press from government. *Chicago Joint Board v. Chicago Tribune Company,* 307 F. Supp. 422 (N.D. Ill. 1969), *aff'd.,* 435 F.2d 470 (7th Cir. 1970), *cert. denied,* 402 U.S. 973 (1971), presented the courts with a question opposite to the one presented herein. There, an advertiser sought entrance to the advertising pages of the newspaper. In holding that no one has the right to have even a political advertisement published by a

[1] United States Pretrial Memorandum, p. 12, filed 1/28/71, *United States v. Hunter,* Civil Action No. 70-816T, D. Md.

newspaper, the courts noted the history of disassociation between the news media and the government. The instant case, however, would seem to seriously imperil that salutary doctrine, for if the state may dictate what type of advertisements cannot go into a newspaper, there is no logical barrier to a state compelling what must go into a newspaper. We believe that this Court, by the instant decision, has provided the states with that intolerable power.

6. The *amicus curiae,* American Newspaper Publishers Association, has authorized counsel to state that it concurs in, and strongly endorses, the grounds hereinabove set forth and most respectfully urges that this petition be granted.

## CONCLUSION

For the reasons stated herein, the petitioner, Pittsburgh Press Company, prays that this Court grant its Petition for Rehearing of the June 21, 1973 decision in this case.

## CERTIFICATE PURSUANT TO RULE 58(1)

In accordance with Rule 58(1), the undersigned counsel hereby certify that this petition is presented in good faith and not for delay.

Respectfully submitted,

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